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No.:_____

IN THE

# Supreme Court of the United States

**October Term, 1982**

WILLARD WILLIAMS,

*Petitioner,*

-against-

THE UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented

1. Does an individual have any privacy interest protected by the Fourth Amendment in the contents of sealed opaque containers which by necessity are placed curbside at his residence for trash collection? Did the repeated warrantless, non exigent searches, on fourteen occasions over a six month period of twenty-three sealed bags of petitioner's trash, offend Fourth Amendment rights as enunciated by this Court?

2. Did the Second Circuit's decision upholding the court ordered eavesdropping conflict with 18 U.S.C. §2518(4)(c) and the Fourth Amendment rule of particularity as to the place from which conversations may be seized? Did the continuous eavesdropping of second floor bedroom conversations following two orders expressly limiting interceptions to first floor living room conversations in a two level duplex apartment, offend Petitioner's constitutional and statutory rights where the Government conceded the absence of probable cause as to the second floor bedroom?

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**October Term, 1982**

WILLARD WILLIAMS,

*Petitioner,*

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THE UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Willard Williams, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 18, 1983.

### Opinions Below

The opinion of the Second Circuit, rendered on February 13, 1983 is unreported but reproduced in the Appendix, *infra* at p. 1a.

The opinion of the District Court rendered on December 1, 1981 is reported at 527 F.Supp. 859 (SDNY, 1981) and is reproduced in the Appendix, *infra* at p. 38a.

## Jurisdiction

On February 18, 1983 the Second Circuit entered its judgment affirming the judgment of conviction entered by the District Court, Southern District of New York, following a guilty plea finding petitioner guilty of one count of an indictment charging him with organizing a continuing criminal enterprise engaged in the possession and distribution of narcotics in violation of 21 U.S.C. 848.

Petitioner was sentenced on May 7, 1982 to the custody of the Attorney General for a lifetime term without parole.

*Petitioner is the only defendant ever to receive a life sentence without parole under this statute on a guilty plea.* He is serving that sentence.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Constitutional Amendment Involved

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated...

## Statement of the Case

The Second Circuit reviewed a judgment of conviction entered in the United States District Court for the Southern District of New York on May 7, 1982 by the Hon. Richard Owen, United States District Judge, following petitioner's plea to a violation of 21 U.S.C. 848 charging that he engaged in a continuing narcotic enterprise.

Petitioner received, on his plea, the maximum sentence provided by law, i.e. a life sentence without any chance of parole.*

The case against Petitioner was in large part established by the fruits of repeated warrantless non-exigent searches, on at least fourteen occasions over a six-month period, of twenty-three sealed bags of petitioner's trash which he had placed on the sidewalk outside of the apartment building in which he lived. No application was ever made to a judicial officer to seize or to search the bags. The fruits of the searches provided the foundation for the court-ordered eavesdropping. The courts below disposed of the issue raised by treating the trash as abandoned property.

This Court has previously indicated an interest in the issue of whether an urban dweller can be said to have no expectation of privacy when, by necessity, he is forced to place his trash outside his home for collection. See *People v. Krivda*, 5 Cal. 3d 357, 96 Cal. Rptr 62, 486 P.2d 1262, *cert. granted*, 405 U.S. 1039, remanded 409 U.S. 33 (1972) Aff'd on both state and federal grounds, 8 Cal. 3d 623, 105 Cal. Rptr. 521, 504 P.2d 457, *cert. denied*, 412 U.S. 919 (1973).

The remaining foundation for the case against the petitioner were the fruits of two eavesdropping orders. These orders limited the authorized intercepts to the one area in petitioner's two-story two apartment duplex where probable cause existed to believe criminal activity had been taking place, that being the ground floor living room area (Apartment J).** The government conceded

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* Filed at the same time as this petition is petitioner's *certiorari* petition from the Second Circuit judgment in *Williams v. United States* wherein that Court ruled that despite the "ill advised" comments of the Trial Judge prior to the guilty plea, which the defense claimed reasonably conveyed the impression petitioner would not receive a life sentence, they "fail to provide a basis for the § 2255 claim of involuntariness..."

** Reproduced in the Appendix *infra* at p. 52a is a copy of the first order. The two orders had the same limitation.

that no probable cause existed to believe criminal conduct existed in the upstairs apartment (Apartment 1J) which was petitioner's bedroom.*

The government, having drafted the orders, understood that the orders limited the right to intercept only those conversations occurring in the ground floor living room.** Within days of the installation of the first eavesdropping device, however, it became clear that the device, though placed on the ground floor, was picking up incriminating conversations from the upstairs apartment.

The record was also clear that the government, in its five-day reports as well as the renewal bugging application and the wiretap order, not only kept the facts from the Court, but falsely represented that the fruits were those only of first floor conversations.***

The Trial Court and the Second Circuit both ruled that as long as the devices were placed on the ground floor, then it was appropriate to intercept conversations from areas other than the first floor, if the conversations could be picked up on first floor devices. This view, we suggest, is closely comparable to the discredited Ninth Circuit analysis rejected in *Katz v. United States*, 389 U.S. 347 (1967). There, as here, the bug was placed in a non-protected area (in our case, in an authorized area). Conversations were picked up, however, originating in a protected area. Despite the Ninth circuit view, this Court ruled that the intercepts violated the petitioner's Fourth Amendment rights.

Once these motions were denied, petitioner pleaded guilty pursuant to 21 U.S.C. 848 reserving the right to appeal issues raised relating to his pretrial suppression claims.

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* See *infra*, p. 20.

** Reproduced in the Appendix at p. 57a is the relevant portion of the government's instructions to the agents.

*** Reproduced in the Appendix at p. 60a is a typical 5-day report.

Prior to plea, these claims were reserved:

(1) that the repeated warrantless non-exigent searches on at least fourteen (14) occasions over a six-month period of twenty-three (23) sealed bags of petitioner's trash violated his Fourth Amendment rights and thus, tainted the electronic surveillance orders;

(2) that the execution of the electronic surveillance orders amounted to general searches in that agents, though authorized to intercept conversations from the first floor of petitioner's apartment, knowingly and repeatedly intercepted conversations from the second floor apartment of his two floor duplex. The intercepts, therefore, were beyond the limits of the orders. If on the other hand the Second Circuit were correct that the orders permitted interceptions of conversations wherever occurring, as long as picked up on the first floor bug, then the orders, we submit, were infirm as in the nature of general warrants by reason of their lack of specificity as to the place from which the conversations could be intercepted.*

## The Second Circuit Opinion

As to the search of petitioner's trash, the Court ruled that the "placement of it for collection on a public sidewalk is inconsistent with the notion that [Williams] retains a privacy interest in it. His act is one of abandonment."

With respect to the challenge to electronic surveillance, the Court ruled that the orders permitted agents to intercept such communications as might be audible by an unenhanced bug in the ground floor living room, even though originating from the second floor bedroom.

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* Another issue was reserved: whether the eavesdropping orders were signed by an official authorized to do so. See Appendix p. 14a-17a. We will rely on and adopt the arguments on this issue to be made in the petitions of co-defendants Porcelli and Guippone.

The Court ruled that its holding did not convert the eavesdropping orders into general warrants since the orders authorized interception of narcotics-related conversations and specified the location where the devices were to be placed. The Court erroneously did not consider it crucial that the orders did not specify the place from which the conversations could be seized.

## Reason for Granting the Writ

### The Decision Below Raises Important Issues of Federal Constitutional Law Which Have Not Been and Should Be Resolved By This Court

***A. The Second Circuit Erroneously Interpreted This Court's Fourth Amendment Holdings When It Ruled That An Individual Is Deemed To Have Abandoned Any And All Expectations Of Privacy In Sealed Bags Of Trash Which By Necessity Are Placed Curbside At His Home For Collection. Repeated Warrantless, Non-Exigent Searches, On Fourteen Occasions Over A Six-Month Period, Of Twenty-Three Sealed Bags Of Petitioner's Trash Violated His Fourth Amendment Rights.***

It was December 19, 1980 when DEA agents first observed the manner in which Petitioner disposed of his trash. He placed in the corridor, just outside his apartment, "an apparently full green garbage bag uniquely closed at the top with a light brown tape approximately an inch in width." Thereafter, between December, 1980 and May 26, 1981, the agents made more than 14 warrantless seizures from the sidewalk where the trash was placed, followed by warrantless searches of the contents of twenty-three *sealed* bags. No claim of exigency was made.

The warrantless searches revealed, among other things, rent receipts, pharmacy prescription labels, bank receipts, traces of narcotics, mannite wrappers, and handwritten notes reflecting the financial details of petitioner's narcotic transactions, with names of suppliers, customers and amounts owed. The results

formed the *sine qua non* of the government's proffer on the issue of probable cause for the two eavesdropping orders, as well as subsequently obtained search warrants.

Petitioner presses that the placement of his trash in sealed opaque bags for collection did not manifest a surrender of any and all expectations of privacy to the police or the general public. The contents of the bags were carefully concealed and pains had been taken to seal them. The contents were not visible without emptying or searching through the bags. Opaque bags had been chosen. Under such circumstances, petitioner had a reasonable expectation that his trash would not be rummaged through and picked over by law enforcement officers acting over a period of six months without a search warrant.

It was in the lodestar case of *Katz v. United States*, 389 U.S. 247 (1967), that the Supreme Court held that the Fourth Amendment protects people not places, from unreasonable intrusion into their privacy by the government. This Court declared:

> What a person knowingly exposes to the public is not a subject of Fourth Amendment protection (citations omitted). *But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.* (citations omitted). (Emphasis added) 389 U.S. at 351-352.

When petitioner placed his trash in an opaque container and took pains to seal it with tape, he intentionally chose to preclude exposure of the contents of the bag to the public. A citizen should not be required to keep his garbage piled up in his home to avoid exploratory searches by the police.

It is conceded that not every privacy interest which a person asserts is constitutionally protected. "The application of the Fourth Amendment depends on whether the person invoking its protection can claim a

'justifiable,' a 'reasonable,' or 'legitimate' expectation of privacy that has been invaded by government action." *Smith v. Maryland,* 442 U.S. 735, 99 S. Ct. 2577 (1979). This turns on whether the individual's conduct demonstrates an actual subjective expectation of privacy and whether such an expectation is justifiable. *Chenkin v. Bellevue Hospital Center,* 479 F. Supp. 207 (SDNY, 1971).

There can be no dispute that petitioner manifested an actual, subjective expectation of privacy. A person who willingly engages in criminal conduct in Times Square at high noon picks his spot and if he is observed, he could hardly claim that such observation by the police constituted a Fourth Amendment violation. How very different though is the case at bar where by necessity (1) the garbage had to be removed from the apartment, and (2) petitioner as a signal of his subjective interest in privacy, used an opaque bag and then carefully sealed it with a separate piece of tape. There existed an actual, subjective expectation of privacy on the part of petitioner. The act of necessarily ridding his apartment of garbage should not be viewed as a voluntary act abandoning his privacy interest to rummaging police officers acting without judicial authority. (See: *Reid v. Georgia,* 100 S. Ct. 2752 (1980).

It is agreed that subjective expectation of privacy, standing alone, is generally not enough to generate Fourth Amendment protection. There must be an expectation of privacy which society is prepared to recognize as reasonable. Central to any application of the *Katz* rule, as this Court later put it in *United States v. White,* 407 U.S. 745 (1971), is a determination of what "expectations of privacy are constitutionally 'justifiable'." But, how then is one to determine whether society would be willing to view as reasonable petitioner's expectation that his sealed trash not be rummaged through without a warrant? According to Mr. Justice Harlan in his dissent in *White,* the question must be answered by assessing the nature of a particular practice, the likely extent of its impact on the individual's

sense of security balanced against the utility of the conduct as a technique of law enforcement.

Starting with Justice Harlan's analysis in *Katz*, courts have drawn upon the customs and sensibilities of the people at large in order to determine what expectations are constitutionally reasonable. The nature and quality of privacy is determined by the operation of the mores on a society and this dictates the sort of privacy one is led to expect. *U.S. v. Vilhotti*, 323 F. Supp. 425 (SDNY, 1971). Against the expectation of privacy held by an individual courts must make a judgment whether the particular practice threatens a reasonable person's sense of security. *6 U. Mich. J. L. Ref.* 154, 179-180. Professor Amsterdam has framed this portion of the *Katz* test in these terms: whether permitting the police regularly to engage in the questioned practice, limited nothing more than by their own self-restraint requires the people to which the Fourth Amendment refers to give up too much of their freedom as the cost of privacy. "Perspectives on the Fourth Amendment" 58 *Minn. L. Rev.* 349 (1974).

The issue is not whether the requirements of law enforcement may necessitate the search of a citizen's trash; rather, whether the average citizen is reasonable in expecting that before police officers embark on a course of continued searches through one's sealed trash in an attempt to uncover incriminating evidence, a judicial officer will be given the opportunity to weigh privacy against need. In the area of Fourth Amendment rights, courts do not, except in extraordinary situations, permit law enforcement officials the exclusive right to determine for themselves whether privacy ought to fall in the face of a law enforcement need. Law enforcement officials in non-exigent circumstances would not be seriously hampered by a requirement to seek judicial authority before rummaging through a citizen's trash in an exploratory way for any bits and pieces which could incriminate the individual. To be sure, this Court has reaffirmed the cardinal principle that 'searches conducted outside the judicial process, without prior

approval by judge or magistrate, are *per se* unreasonable under the Fourth amendment - subject only to a few specifically established and well delineated exceptions.' *Ross, supra* citing *Mincey v. Arizona*, 437 U.S. 385, 390. See also, *U.S. v. Chadwick*, 433 U.S. 1.

The only possible way to justify the police conduct in the case at bar is improperly to reach back to a pre-*Katz* analysis. This is just what was done in *U.S. v. Dzialak*, 441 F.2d 212 (2nd Cir. 1971) where in upholding a warrantless trash search, the Court post-*Katz*, nonetheless relied upon *Abel v. U.S.*, 362 US. 217 (1966) for the proposition that trash was abandoned property outside the protection of the Fourth Amendment.

In *Dzialak*, defendant was a driver for the Railway Express Agency. An REA agent, investigating the disappearance of merchandise, searched the curbside trash in front of Dzialak's home and seized incriminating evidence. The fruits of this *private* investigation were turned over to the FBI which then obtained a warrant for the search of Dzialak's home. The defense sought to suppress simply by reason of the agent's violation of the City Administrative Code prohibition against searches of trash.* The Court, however, was not persuaded that the ordinance negated proof of an intent to abandon. To the *Dzialak* court, and the weight of authority, "the act of placing (trash) for collection is an act of abandonment and what happens to it thereafter is not within the protection of the Fourth Amendment." *U.S. v. Crowell*, 586 F.2d 1020, 1025 (4th Cir. 1978). See also *U.S. v. Vahalik*, 606 F.2d 99 (5th Cir. 1979); *U.S. v. Shelby*, 573 F.2d 971 (7th Cir. 1978); *Magda v. Benson*, 536 F.2d 111 (6th Cir. 1976).

In *Abel v. U.S.*, 362 U.S. 217 (1960), this Court first addressed the matter of Fourth Amendment rights in

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* Clearly Dzialak was mistaken to claim that violation of the Code made the search illegal. Properly viewed, the existence of the Code provision should be taken as reassuring the citizen that some degree of privacy will be respected.

trash. Pre-*Katz* this case dealt with a defendant who left materials in a hotel room from which he had checked out. At a time when property law notions were the key to resolution of Fourth Amendment claims, this Court held that *Abel* had surrendered any constitutional protection in the discarded items.

In light of *Katz* and its progeny, *Abel* should not, in the case at bar, be considered dispositive. Even before *Katz*, this Court had signaled the end of relying solely upon property law concepts to dispose of Fourth Amendment claims. See: *Warden v. Hayden*, 387 U.S. 294, 304 (1967).*

Petitioner's expectation of privacy was higher and rightly more intense than a checked out hotel guest who had no expectation whatever of returning to the place from where he had departed. The Court, in *Rios v. U.S.*, 364 U.S. 253, 262, n.6 (1960), spoke of *Abel* in terms of a vacated room.

The California courts appear best to appreciate the compelling privacy factors in an urban society in sealed trash placed curbside for collection. See: *People v. Krivda*, 5 Cal. 3d 357, vacated and remanded, 409 U.S. 33, affirmed on basis of both state and federal constitutions, 8 Cal. 3d 623.

We do not mean to suggest that in all events, is trash protected from warrantless searches. The vacated room situation, as in *Abel* would not require a warrant. See *U.S. v. Jordan*, 399 F.2d 610 (2nd Cir. 1968). Some of the other situations in which trash would probably not be protected are as follows: *Trash deposited in a roadside barrel or a refuse container in an airline terminal: U.S. v. Jackson*, 448 F.2d 963, 971 (9th Cir. 1971), *cert. denied*, 405 U.S. 924 (1972) (privacy under the *Katz* rationale forfeited when defendants placed articles

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* While property law concepts may still be considered, there can be no finding of abandonment where petitioner discarded his trash out of "necessity, duty or utility to himself." *Katsaris v. U.S.* 684 F.2d 758 at 762 (5th Cir. 1982).

in public trash can outside motel room). *Trash that is in plain view near or on top of a trash container: People v. Sirhan,* 7 Cal. 3d 369 (policeman saw letter lying in plain view in box of trash while stationed in backyard to protect privacy of mother of alleged assassin of Senator Robert Kennedy): *U.S. v. Stroble,* 431 F.2d 1273 (6th Cir. 1970) (empty carton and IBM card lying beside garbage cans); *Davis v. U.S.,* 327 F.2d 301 (9th Cir. 1964) (marijuana discovered in plain view in two wastebaskets after valid entry of home); *Trash seized with valid third party consent: Abel v. U.S.,* 362 217, 225 (1960) (items seized from wastebasket after hotel management consented to search following Abel's checkout but before the normal checkout hour); *Roberts v. U.S.,* 332 F.2d 892 (8th Cir. 1964) (wife consented to seizure of bullet abandoned by husband in ceiling of home). *Trash seized under exigent circumstances: U.S. v. Brown,* 457 F.2d 731 (1st Cir. 1972) (substantial risk of destruction of evidence in trash barrel and rubbish piles) (the *Brown* court did not reach what it termed the "difficult" issue of whether trash is abandoned property, *id* at 734 n.2); *People v. Stewart,* 110 Cal. Rptr., 227 (Ct. App. 1973) (probable cause existed and trash about to be collected).

In the case at bar, assuming a law enforcement need to seize the garbage, it nonetheless was in a sealed opaque bag when seized. See: *U.S. v. Chadwick,* 433, U.S. 1; *Arkansas v. Sanders,* 442 U.S. 753, which place great emphasis on the expectation of privacy arising from the act of sealing or locking a container. In *United States v. Ross,* _____ U.S. _____ (June 6, 1982), this Court stated:

> One point on which the Court was in virtually unanimous agreement in *Robbins* was that a constitutional distinction between "worthy" and "unworthy" containers would be improper.
>
> * * *

> *As Justice Stewart stated in Robbins, the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.* 453 U.S., at 427 (plurality opinion). (Emphasis added.)

Even items thrown away do not justify, without more, a warrantless search of contents when the container is reduced to police possession and no exigency exists. See *Reid v. Georgia*, 100 S. Ct. 2752 (1980). The right to seize does not confer the right to conduct a warrantless search. *Walter v. U.S.* 100 S. Ct. 2395 (1980).

The fact that the trash container in the case at bar was in a public place, did not dispense with the need to utilize the warrant process to conduct a search even though the showing of cause is concededly less than for the search of other places such as a home. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

It is no answer to say that petitioner might have taken steps to further protect his garbage, i.e. by calling a private collector or by shredding it. It would be a perversion of *Katz* to interpret it as extending protection only to those who resort to special means to keep personal information from the outstretched hands of the police. To dispose of this case by suggesting petitioner could have done more to ensure his privacy, is to say: Mr. Katz could, of course, have protected himself against surveillance by forbearing to use the phone. *Amsterdam, supra* at page 402. By the same reasoning *Chadwick* could have chosen to leave the footlocker at home, *Walter* could have taken steps to insure proper delivery of his mail, *Reid* could have chosen to better secrete the case or to have held on to it, and the now famous *Mrs. Mapp* could have taken steps to more carefully hide her narcotics. Such an analysis which would dispose of Fourth Amendment claims by resort to what might have been, what could have been done, has never proved sufficient in other Fourth Amendment contexts to defeat a Constitutional claim. There is simply no

reason why in this context, a right of such magnitude should fall by the utilization of what amounts to a flippant response.

To protect those financially able to hire private collectors or purchase shredders would be to invest more protection in the wealthy than poor. Petitioner, by reason of illness, was essentially confined to bed and could not personally take his trash to a dump. There is no reason to favor the privacy rights of the mobile over those persons confined to their home.

In conclusion, the continued warrantless searches of petitioner's trash over a course of six months violated petitioner's Fourth Amendment rights. Accordingly, the eavesdropping orders which relied upon the fruits to a material extent were fatally tainted.

***B. The Second Circuit Decision Upholding The Court Ordered Eavesdropping Conflicted With 18 U.S.C. 2518 (4)(c) And The Fourth Amendment Rule Of Particularity As To The Place From Which Conversations May Be Seized. The Continuous Eavesdropping Of Second Floor Bedroom Conversations Following Two Orders Expressly Limiting Interceptions To First Floor Living Room Conversations In A Two-Level Duplex Apartment, Offended Petitioner's Constitutional And Statutory Rights Where The Government Conceded The Absence Of Probable Cause As To The Second Floor Bedroom.***

**1. Factual Discussion**

NATURE OF THE ORDERS

On February 18, 1981 and April 2, 1981 Judge Ward only found that there was probable cause to believe "that the first floor duplex Apartment J" was being "used by, or is being used by and will be used during the period of interception" for the commission of crimes. The Court was obliged to and did limit the interceptions of oral conversations concerning described offenses to those *from* the first floor of duplex Apartment J.

The moving affidavits of AUSA Ruggiero and Agent O'Connor submitted in support of both orders, had proffered probable cause only with respect to criminal activity and oral communications limited to "inside the first floor of duplex Apartment J."*

The government drafted the orders. The instructions which it gave to the monitoring agents, made it crystal clear that there was authority to intercept only such conversations as occurred "inside the first floor" of the duplex. The agents were instructed that because of this, they were to identify "all the people who used the first floor."**

On February 23, 27, March 4, 16 and 19, the District Court was furnished with five-day reports, purporting to represent "interceptions of oral communications occurring in the first floor of duplex Apartment J." Five-day reports were submitted at appropriate intervals after the April 2nd Order, representing that first floor conversations were all that were being intercepted.

The prosecution, as early as February, 1981, was aware that the bugs which it placed in the first floor were picking up conversations which occurred inside the second floor. It kept this fact from the Court.

What the government did, was purposely to place bugs inside the first floor so that by reason of their range or the transient nature of the instrument into which one of the bugs was placed, conversations could be intercepted which occurred on the second floor. Or having appropriately placed the bugs in the first instance, the government decided to keep them in place upon learning they were intercepting upstairs conversations.

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* The government conceded probable cause existed only as to the first floor: *infra* p. 20.

** See Appendix p. 57a, the government's instructions.

Petitioner's position was this:

(1) The orders only authorized interceptions of oral communications of persons conversing on the first floor. Execution of the orders whereby agents knowingly intercepted second floor conversations amounted to a general search.

(2) If the Courts below correctly interpreted the orders as permitting interception of oral communications between parties wherever they might be as long as they were picked up on these bugs, the orders were infirm for they constituted general warrants in that they did not set forth with required specificity the place from which the conversations were to be intercepted.

(3) In either event, suppression of all the tapes, under the circumstances, was the appropriate remedy.

THE HEARING AND DECISION

On February 18, 1981 Officer Murray, posing as a telephone repairman, entered the first floor apartment of petitioner and placed two bugs in that apartment (A 498).* One bug was placed in the telephone block on a wall near the couch, the other into the beige telephone (A 498). The bugs so placed could not intercept upstairs conversations (A 499). On February 20, Officer Myers entered, replaced the malfunctioning beige phone and took out the black phone at petitioner's request ostensibly to repair it. He brought it back on February 24. Petitioner placed a long extension cord on the unbugged black phone. The bugged beige phone on arrest had the standard 12-15 feet cord.

The man who designed the bugs, Robert Brady, positively testified that use of his bug (which had a range of 3-15 feet) even if placed midway up the staircase, could not pick up a full television dialogue or a continuous upstairs conversation. Many tapes did just

* "A" refers to Appendix filed in Second Circuit.

that. While the government claimed it installed Brady bugs, Mr. Brady had no firsthand knowledge of this. Clearly, the range of the Brady bug did not comport with the way the instant bugs performed. The range into the upstairs bedroom picking up full dialogue pointed to enhancement alterations to his kind of bug. Brady testified that he had the capacity to provide a stationary bug for installation on the first floor to intercept downstairs conversations just as the Court had ordered. However, no one from the government asked him to do so. If the range of interceptions were widened by placement into a mobile unit such as a phone, it is clear the government made a considered choice to do this since it was not necessary to place the bug in a phone.

Days after installation, agents ran into these difficulties: one bug malfunctioned and, the agents believed they were picking up second floor conversations. The prosecutor was alerted and a decision was made to reenter Apartment 1J, but to deal with one problem: correct the malfunctioning bug, not to correct the condition which caused interception of impermissible conversations. No one consulted Mr. Brady to explore whether one he had available could properly limit interceptions to first floor communications. The Court, in a five-day report, was told of the defective nonoperating bug; it was, however, not told of the interception of upstairs conversations.

The government's initial position was that the intercepts were those of first floor conversations. This was abandoned when DEA handwritten log entries showed conclusively that upstairs conversations were being intercepted and agents knew it. The supervising DEA Agent admitted that his agents were aware of these upstairs interceptions shortly after installation of the bugs. Faced with the existence of many upstairs interceptions, the government then pressed the doctrine of plain view, that is, if the bugs were properly placed then interceptions of upstairs activity were proper. The inadvertence criterion of the plain view doctrine was, we suggest, overlooked:

1. Having knowledge of the layout of the two apartments, the government chose to place a bug in a mobile unit, such as a phone, in order to increase the possibility of a range of interceptions wider than ordered.

2. Knowing that the bugs were intercepting upstairs conversations the government, on the second and third entries, could have corrected this, but chose only to enter to replace one which had ceased to operate.

3. The government wrongfully chose to keep the facts from the Court. So too, Mr. Brady was not consulted to secure from him an instrument which would do just as the Court had ordered. Obviously, the government was satisfied to seize upstairs conversations.

4. The government affirmatively mislead the Court in repeated five-day reports and in the second application on April 2, 1981 by representing that all interceptions were of first floor conversations.

5. As final evidence of their desperation, the government asserted that Judge Ward obviously knew there were upstairs conversations since the prosecutors sent him the voluminous DEA handwritten logs, along with the five-day reports. This argument is important for by it, the government recognized that agents obviously knew when they prepared the logs that they were intercepting upstairs conversations. The argument is nothing short of preposterous in pressing that what with Judge Ward having five-day reports advising these were first floor communications, he would have labored on his own through the hundreds upon hundreds of handwritten logs to see if there were any indications of second floor interceptions.

In its ruling, the Trial Court first stated that a different issue would exist were the bugs overly sensitive. Here, they were "standard." Title III, however, contains no definition of "standard bugs." What was standard in 1968 may be different from the standards of 1981. It is impossible to support the findings below

that the bugs were standard or unenhanced since physical inspection and independent examination of the bugs were denied by the Trial Court despite requests therefore.

The Trial Court erroneously found that petitioner kept the bugged phone just a few feet from his bed and the TV set. However, the bugged beige phone was plugged in downstairs and attached to the 12-15 foot cord installed by the Telephone Company (A 504). Petitioner had attached a long cord to a downstairs black unbugged phone making it possible only to bring this instrument upstairs. Confusion over which instrument had been attached to the long cord was clarified by reference to the record (A 352-53, 363-64).

The courts below ruled that once the "standard" bugs were placed downstairs, any conversation wherever occurring, could be intercepted.

**2. Legal Discussion**

THE SEIZURE OF UPSTAIRS CONVERSATIONS AMOUNTED TO A GENERAL SEARCH

The government took pains in its papers in support of the orders to particularize conversations to be seized ("from" the first floor). Instructions given to the agents were to monitor conversations "inside the first floor." Because of this, agents were to familiarize themselves with persons entering and leaving the first floor (no mention being made of the second floor). These instructions were properly meant to limit the discretion of the agents to first floor conversations and to avoid the danger of a general search (see *U.S. v. Heldt*, 668 F.2d 1238, 1260 (D.C. 1981). The Courts below erroneously dismissed the government instructions as being "overly restrictive." This ignored the fact that once the government proffered probable cause only as to the first floor,

the Court and government simply could not justify the seizure of upstairs conversations. It is crystal clear that the government conceded the absence of any probable cause with respect to upstairs conversations. We need only look to the *government's hearing memorandum* where it admitted:

> Furthermore, monitoring agents had absolutely no reason to believe that there would be narcotics conversations in Williams' bedroom. By no stretch of the imagination can it be said that in advance of installing the bug the agents had "probable cause to believe" that they would be able to intercept relevant conversation from the second floor. (Citation omitted). Even before the electronic bug surveillance began the agents accumulated a great deal of evidence regarding the nature of Williams' narcotics activities. Not one bit of that evidence, including physical and video tape surveillance, even suggests that the narcotics suppliers and customers who visited Williams' apartment had narcotics conversations with him in his bedroom upstairs. Every bit of that evidence suggested those conversations took place on the first floor of his apartment. Therefore, the agents installed a bug which eliminated their capability of intercepting conversations from the second floor of Williams' apartment(A 385).

It is entirely appropriate in determining the intendment and limit of the orders to consider the "papers as a whole" which the government submitted to the Court. *U.S. v. Torterello*, 480 F.2d 764, 780 (2nd Cir. 1974).

When Judge Ward issued the orders on February 18, 1981 and April 1, 1981, he could not have intended to authorize seizures beyond that for which probable cause had been shown (e.g. from upstairs). An eavesdropping order may never go beyond the probable cause showing in the moving afidavits. See *U.S. v. Parmenter*, 531 F.S. 975 (D.C. Mass 1982), *U.S. v. Hinton*, 219 F.2d 324 (7th Cir. 1955). In *Hinton, supra*, the Court stated:

> ... the scope of the warrant to search is dependent upon the extent of the showing of probable cause. The command to search can never include more than is covered by the showing of probable cause to search.

Apartment J (the downstairs) and 1J (the upstairs) were separate apartments. Even were a warrant to specifically authorize interceptions from both places on a showing of probable cause only as to one unit, the warrant would be defective due to overbreadth *(Steele v. U.S.*, 267, U.S. 2198 (1925); *U.S. v. Bermudes*, 526 F.2d 89, 97 (2nd Cir. 1975). *A fortiori*, it was inappropriate to seize second floor conversations where the government specifically conceded no probable cause as to the second floor and the order itself limited interceptions to first floor conversations.

Obviously, as a "responsible official" Judge Ward intended to "take care to assure that the eavesdropping would be conducted in a manner that minimized unwarranted intrusions upon privacy." *Andresen v. Maryland*, 427 U.S. 463 (1976). Having the government's moving papers before him which asserted probable cause only to seize downstairs conversations, it is clear that his orders meant to go no farther. To construe Judge Ward's orders as unlimited as to the place where the conversants might be - which is the practical effect of the lower courts' interpretation of the orders - is to offend the Fourth Amendment and the statutory limitation requiring specificity as to the area to be covered by the eavesdropping operation. 18 U.S.C. 2518(1)(b). Title III was meant to eliminate the vice of entrusting agents with a "Roving Commission" to seize conversations *Berger v. N.Y.*, 388 U.S. 41 (1967). It is recognized that the authority to search granted by a warrant is limited to the specific places described in it and may not extend to additional or different places. See e.g. *Keiningham v. U.S.*, 287 F.2d 126, 129 (D.C. Cir. 1960), *U.S. v. Principe*, 499 F.2d 1135, 1137 (1st Cir. 1974); W. LaFave, *Search and Seizure* §4.10 (1978).

The position taken by the Courts below, to the effect that if the bugs were properly placed they could seize conversations anywhere within the apartment, even from a place such as the upstairs area for which no probable cause existed, is one not far different from that rejected in *Katz v. U.S.*, 389 U.S. 347 (1967). There, as in the case at bar, agents were within their authority to place a bug in a given location. The issue was, given the fact that the device was placed in an area which did not violate Katz's Fourth Amendment rights (and here with the Court orders, the placement of the bugs in Williams' apartment was not an unlawful intrusion into his Fourth Amendment rights) whether the interception was prohibited because he spoke in a private area. The Court of Appeals for the Ninth Circuit, in upholding Katz's conviction, ruled that since the bug had been placed in an authorized area, seizure of his private conversation was not violative of his Fourth Amendment rights. This Court in reversing, held that the reach of the Fourth Amendment turns not on where the device is placed; rather, upon whether the intrusion is violative of one's reasonable expectation of privacy.

Applying the reasoning in *Katz* to the case at bar, it becomes clear that placing the bug in a judicially approved area is of no constitutional significance when there is the seizure without probable cause of conversations in an area in which petitioner reasonably expects the highest degree of privacy (i.e. his bedroom). The verity is that a warrant cannot justify a search into an area where one rightfully expects privacy if probable cause is lacking.

In a case where a person speaks so loudly that his voice can be overheard by the "naked human ear" it may be said he has surrendered a reasonable expectation of privacy. *U.S. v. Agapito*, 620 F.2d 324, 330 (2nd Cir. 1980). It is recognized that "as soon as electronic surveillance comes into play, the risk (to privacy)

changes crucially." Brennan, J. dissenting in *Lopez v. U.S.* 373 U.S. 427, 465-66. In short: [A]ny enhanced* method of viewing or listening into the interior of a home impairs a legitimate expectation of privacy unless covered by or excepted from the warrant requirement." *U.S. v. Taborda*, 635 F.2d 131, 138, fn. 7 (2nd Cir. 1980).

In the case at bar, the orders specifically restricted seizures to ground floor conversations and there were no facts justifying resort to any of the warrant exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

This is not a case where in retrospect the government discovered that upstairs conversations were seized; rather, this is a case where virtually from the outset the government was aware that the bugs were seizing more than what was initially intended and ordered. If the issuing court's use of the language "from the premises known as the first floor" was not particular enough, it was appropriate to refer to the government's papers for the purpose of providing particularity (see e.g. *Heldt, supra* at 1257; *Andresen, supra; U.S. v. Klein* 565 F.2d 183 (1st Cir. 1977); in re *Search Warrant*, 572 F.2d 321, 324-327 (D.C. Cir. 1978)). The government's moving papers left no room for doubt that there was not one bit of inculpatory evidence to justify intrusion into the upstairs bedroom.

The government did nothing at all to enable Judge Ward to determine if his orders were being faithfully adhered to. Congress intended the Five-Day Reports to provide an opportunity for a judicial "check." Requiring reports was to assure correction of "any abuses" (See

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* Were the bugs enhanced? If Mr. Brady were correct about the range of his kind of bug that it could not pick up full television dialogue or continuous upstairs conversations, then it is clear the range of bugs in the case at bar went beyond that expected of the Brady bug. The Trial Court denied repeated demands to inspect and test the bugs. The findings below that the bugs were not enhanced was made without counsel or the Trial Court being given the opportunity to inspect the devices.

*Senate Report*, 1097, 1968, U.S. Code Cong. and Admin. News 2193; *U.S. v. Kahn*, 415 U.S. 143, 154 (1974). Not only was the Court not advised that upstairs bedroom interceptions were being made, it was falsely reassured that only downstairs conversations were being intercepted.

Late in the hearing the government first raised the doctrine of plain view to justify the seizure of conversations other than those Judge Ward had ordered. But use of this doctrine under the circumstances of this case would permit a "government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley v. Georgia*, 394 U.S. 557, 572, 89 S. Ct. 1243, 1251, 22 L.Ed 2d 542 (1969) (Stewart, J., concurring).

In *Coolidge v. New Hampshire*, 403 U.S. 443, at 465 (1971) a plurality of the Court set out a limitation to the use of the plain view doctrine, that the searching agents must come upon the unspecified items inadvertently. An agent must be acting in good faith to confine himself to searching for the specified items when he happens upon an unspecified item. To the inadvertence criterion, good faith must be added. *U.S. v. Hubbard*, 493 F.S. 209 (D.C. 1979). The plain view doctrine "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge, supra* at 466. Applied to electronic eavesdropping, when a monitoring agent unexpectedly hears a conversation concerning a crime other than one specified in the order, he is per-

mitted to listen to and record the conversation.* However, the case at bar is so very different from situations justifying the seizure of items in reliance on the plain view doctrine for these reasons:

(1) here, agents had no right to intercept conversations from the second floor. The proper analogy would be to situations where agents seize items from a second dwelling armed only with an order which permitted a search and seizure of one dwelling. This is not a case of agents acting in a proper place coming upon an item of evidence in the course of a legitimate search; rather, this is more properly likened to a search into an impermissible area and thus, the doctrine of plain view should have no application;

(2) we do not have the element of good faith and/or inadvertence. Agents knew within days of the installation that upstairs interceptions were being made. Log entries reflected this. The government conceded this when it argued that Judge Ward must have known of this from a reading of the log entries.

The inadvertence requirement is not satisfied where agents have reason to know in advance what they will find from the search.

As a final argument to uphold the seizures, the government argued that at worst, there was the failure to minimize and all that would then be infirm were the upstairs interceptions (18 U.S.C. 2518(5). However, the requirement to minimize involves as attempt to insure intercepts only of those communications subject to seizure under Title III. In every case involving claims of failure to minimize, the electronic device picked up communications from permitted areas. The physical

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* Several courts have suggested, however, that subsequent judicial approval would be necessary where agents *continue* to intercept conversations concerning other crimes. See *U.S. v. Marion*, 535 F.2d 692, 705 (2d Cir., 1976).

range of the seizures was not the issue; the contents were *U.S. v. Torterello*, 480 F.2d 764 (2nd Cir. 1974); *U.S. v. Capra*, 501 F.2d 267 (2nd Cir. 1974); *U.S. v. Hinton*, 543 F.2d 1002 (2nd Cir. 1976); *U.S. v. Principe*, 531 F.2d 1132 (2nd Cir. 1976); *U.S. v. Manfredi*, 488 F.2d 588 (2nd Cir. 1973).

Properly viewed the failure to minimize is limited to instances where the agents do not restrict themselves to the kinds of communications authorized by a Title III order. *Scott v. U.S.*, 436 U.S. 128 (1978).

The case at bar involving as it does knowing intrusions into an area not subject to search and in which petitioner has an intense expectation of privacy is more likened to an unconstitutionally impermissible exploratory search rather than a statutory violation of the duty to minimize.

IF THE TRIAL COURT WERE CORRECT THAT THE BUGS COULD SEIZE CONVERSATIONS FROM ANY PLACE, THEN THE ORDERS WERE IN THE NATURE OF GENERAL WARRANTS

The Trial Court and the Second Circuit held that if the government placed the bugs on the first floor as ordered, then any conversations, wherever occurring, could be intercepted. If this be the correct interpretation of the orders, then this ignores the constitutional and statutory requirements that there be specificity of the place from which the conversations are to be seized.

The Second Circuit would limit the particularity requirement to the place where the device is placed and the subject of the seizures without regard to the place from which the seizures may be made. This, we submit, is erroneous.

A citizen's right of privacy would, were the Court correct, depend on the state of the art with respect to bugging devices. Bugs already exist to intercept up to

distances a block away. Advances have been made since the 1968 enactment of Title III. Title III itself gives no definition of a "standard" or "oversensitive" bug. No independent testing of the bugs in the case at bar assured that they were not oversensitive. If the orders can be read as permitting bugs to be placed anywhere on the first floor, even purposely into a mobile unit such as a phone near the common staircase, then the orders invited unwarranted intrusions into the upstairs bedroom for which no probable cause existed and in which petitioner rightfully had the most intense expectation of privacy.

The Fourth Amendment specifically provides that a search warrant must particularly describe the place to be searched. When the Court confined itself to the alleged propriety of the placement of the bugs without regard to limits from which conversations could be seized, it improperly construed Judge Ward's orders as general warrants.

General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings...[The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized. *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971). This requirement "'makes general searches impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant'." *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965), quoting *Marron v. United States*, 275 U.S. at 196, 48 S.Ct. at 76.

Here, the orders permitted seizure of first floor conversations but, according to the Courts below, agents could seize second floor conversations. This is the essence of a general warrant.

THE APPROPRIATE REMEDY

It has been held that flagrant disregard for the limitations in a warrant can transform an otherwise valid search into a general one, thereby requiring the entire fruits of the search to be suppressed. See generally *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978); *United States v. Fernandez*, 430 F.Supp. 794, 801 (N.D.Cal. 1976); *United States v. Nine 200-Barrel Tanks of Beer*, 6 F.2d 401, 402 (R.I. 1925) Cf. *United States v. Tracy*, 350 F.2d 658 (3d Cir.), *cert. denied*, 382 U.S. 943, 86 S.Ct.390, 15 L.Ed.2d 353 (1965) (all evidence suppressed for disregard of limits on use of force).

Suppression of the entire intercepts is the proper result when agents have failed to show a regard for the right of privacy and have not done all they reasonable could to avoid intrusion into an impermissible area. *U.S. v. Feldman*, 606 F.2d 673 (6th Cir., 1979).

It is the bad faith exhibited by the government which makes the unlawful conduct in the case at bar particularly reprehensible. This Court has repeatedly pointed out that the propriety of applying the exclusionary rule may turn on the bad faith of the government in seeking or executing an eavesdropping warrant. In *U.S. v. Donovan*, 429 U.S. 413 (1976), the Court found that the failure to identify the targets in an eavesdropping application did not, ipso facto, warrant suppression. However, the Court stated:

> There is no suggestion in this case that the government agents knowingly failed to identify respondent's Donovan (et al) for the purpose of keeping relevant information from the District Court that might have prompted the Court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case.

In *U.S. v. Cortina*, 630 F.2d 1207 (7th Cir., 1980) where a government agent deliberately lied in an affidavit presented to support a search warrant, the Court held that:

> When Brown lied to the Magistrate, therefore, he committed two offenses: one against the constitutional guarantee, against unreasonable searches and a second against the judicial system. In addition to the consequences flowing from the lack of probable cause, this second injury to the judiciary itself requires this Court to guarantee that one of the tainted evidence reaches the courtroom. Our responsibility to uphold the integrity of the judicial system therefore requires the suppression of all the evidence resulting from the search as to all defendants.

The deception of the Court which took place in the instant case is no less egregious than in *Cortina*. Had Judge Ward been advised that upstairs conversations were being monitored, he could have taken steps to remedy the situation. See *U.S. v. Diadone*, 558 F.2d 775 (5th Cir., 1977) (where the issuing judge was advised of the impossibility of adhering to the minimization instructions and thus, there was no error).

The Ninth Circuit case of *U.S. v. Rettig*, 589 F.2d 418 (9th Cir., 1978) presents the appropriate analysis in disposing of a case like the one at bar. As in *Rettig*, it is simply not possible for the government to show which conversations were intercepted upstairs as compared with downstairs.

In ordering total suppression, the Court wrote:

> We find the record establishes that the agents did not confine their search in good faith to the objects of the warrant, and that while purporting to execute it, they substantially exceeded any reasonable interpretation of its provisions. As interpreted and executed by the agents, his warrant became an instrument for conducting a

general search. Under the circumstances, it is not possible for the court to identify after the fact the discrete items of evidence which would have been discovered had the agents kept their search within the bounds permitted by the warrant; and therefore all evidence seized during the search must be suppressed.

Total suppression is ideally suited to a continued pattern of flagrant disregard for the limitations of provisions of a warrant central to the Fourth Amendment and Title III. When there is added a studied attempt to keep the transgressions from the Court the degree of misconduct becomes so magnified as to justify the remedy of total suppression.

## Conclusion

For these reasons, the petition should be granted.

Respectfully submitted

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April 14, 1983

## Appendix A
## Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 346-47, 348, 388, 349-50, 385, 426, 892
August Term 1982

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Argued: Dec. 1, 1982 Decided: Feb. 18, 1983

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Docket Nos. 82-1125, 82-1175, 82-1179, 82-1181, 82-1183, 82-1189, 82-1177, 82-1185, 82-1187

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*against*

WILLIE TERRY,
*Defendant-Appellant.*

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*against*

ERIC NALVEN, ROBERT GUIPPONE, WILLARD WILLIAMS, ONZELO MARKUM, CLARENCE HAYNES, SAINT JULIAN HARRISON, PAUL JENKINS, and ANTHONY MICHAEL PORCELLI
*Defendants-Appellants.*

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Before: LUMBARD, MANSFIELD and KEARSE,
*Circuit Judges.*

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Consolidated appeals from judgments of the Southern District of New York convicting appellants of violations of federal narcotics laws and conspiracy, 21 U.S.C.

§§ 812, 841, 843, 846, and 848. Defendant Williams pleaded guilty pursuant to a stipulation reserving the right to appeal certain issues relating to pretrial suppression claims. Defendant Terry was convicted after a non-jury trial before Chief Judge Constance B. Motley. The remaining appellants were convicted after a jury trial before Judge Richard Owen. Appellants raise numerous issues, principal of which are challenges to searches of Williams' trash containers, the legality and execution of eavesdropping orders, seizures made during the execution of an arrest warrant, the sufficiency of the evidence against certain defendants and the conduct of the jury trial.

The conviction of Haynes is reversed. The convictions of all other appellants are affirmed.

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MANSFIELD, *Circuit Judge:*

Defendants appeal from judgments of the Southern District of New York convicting them of federal narcotics violations arising out of the same core of operative facts. One indictment (S 81 Cr. 398) charged (1) seven of the appellants (all but Terry) and 10 others[1] with conspiracy to possess and distribute heroin and cocaine in violation of 21 U.S.C. § 846 (Count 1), (2) defendant Willard Williams with organizing and supervising a continuing criminal enterprise in violation of 21 U.S.C. § 848 (Count 2), and (3) various defendants with possession of large quantities of heroin and cocaine in violation of 21 U.S.C. § 841(a)(1) (Counts 3 to 15) and illegal use of the telephone to further the narcotics conspiracy

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[1] Of the 10 remaining individuals, 8 pleaded guilty before trial; one, "Bobby" James, was acquitted after trial; and one is a fugitive. One of the defendants, Paul Jenkins, who pleaded guilty before Judge John M. Cannella, and sought to join in this appeal pursuant to F.R.A.P. 28(i), did not preserve any issues for appeal. Accordingly, we affirm his conviction.

in violation of 21 U.S.C. § 843(b) (Counts 16 to 25). Defendant Williams pleaded guilty to Count Two (criminal enterprise) preserving by stipulation three pretrial suppression claim issues for appeal.[2] The other six appellants were convicted of the conspiracy count and the related substantive offenses charged after a six-week jury trial before Judge Richard Owen.[3] We reverse the judgment convicting appellant Haynes of conviction of conspiracy and illegal use of a telephone.[4] Finding no merit in the other claims of error, we affirm the judgments convicting Williams, Porcelli, Guippone, Harrison, Markum, and Nalven.

A second indictment (S 81 Cr. 426) charged Terry in three counts with similar narcotics violations (conspiracy with Williams and another to distribute heroin and cocaine, possession with intent to distribute 19.4 grams of cocaine and diluents, use of telephone to facilitate conspiracy). After a non-jury trial before Chief Judge Constance Baker Motley, Terry was convicted of all counts and placed on probation for two years. We affirm.

Viewed most favorably to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), the evidence showed that during the period from October 1980 to May 1981 Williams managed from his duplex apartment on East 89th Street, New York City, a continuing narcotics business in which he received and processed wholesale

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[2] Williams was sentenced to life imprisonment without parole. By separate order we reject Williams' claim that his guilty plea should be vacated because of alleged assurances with respect to the sentence he would receive.

[3] Porcelli, Guippone, and Harrison were sentenced to 30-year terms of imprisonment with lifetime special parole. Haynes and Markum received 15-year sentences of imprisonment with lifetime special parole. Nalven was sentenced to 3 years imprisonment. Williams, Porcelli, Guippone and Haynes, as previously convicted federal narcotics violators, were subject to enhanced penalties pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 851.

[4] The government concedes that Haynes' term of special parole was improper. *Bifulco v. United States*, 447 U.S. 381 (1980).

quantities of heroin and cocaine, re-sold these drugs to distributors, paid back the suppliers, laundering and banking the profits, and that all but one of the other seven appellants played active roles in the business, either as suppliers, purchasers, or facilitators (e.g., money launderers, drug testers). Defendants Porcelli and Guippone were the main suppliers of wholesale quantities of heroin and cocaine to Williams. The distributors included appellants Harrison, Markum, Nalven, Terry and various co-defendants. Harrison also became a supplier of cocaine to Williams when he was unable to pay Williams for the heroin he had distributed. This heroin had been supplied by Guippone and Porcelli. Nalven, in addition to acting as a distributor, assisted Williams in testing for purity drugs being supplied to Williams and "laundering" some of the large cash receipts from sales, i.e., arranging to bank the funds as coming from legitimate sources.

The evidence establishing the existence and operations of the narcotics enterprise consisted mainly of (1) testimony of Drug Enforcement Administration (DEA) agents who made an initial purchase of heroin from one of Williams' distributors and engaged in months of continuous surveillance of the defendants, (2) papers and articles retrieved from bags of Williams' trash placed on the sidewalk outside his apartment for collection, (3) pen registers, photographs, video tapes and court-authorized electronic surveillance of conversations among the appellants, (4) post-arrest admissions by some defendants, and (5) articles seized at the time of arrest of some, including one kilogram of cocaine found in Williams' apartment, $400,000 in safe deposit boxes controlled by him ($14,500 of which was part of $40,000 previously paid by DEA undercover agents for the purchase of heroin), firearms and ammunition found in the premises of Harrison, Guippone and Nalven, and cocaine from Harrison's automobile.

The government's investigation into the defendants' narcotics activities began on October 24, 1980, when a DEA agent, Zenford Mitchell, purchased one-eighth of a kilogram of heroin for $40,000 from a previously-convicted narcotics dealer, Steward, who obtained the heroin from an apartment building at 307 East 89th Street, New York City, where defendant Williams, a twice-convicted narcotics distributor, rented and occupied a ground-floor duplex apartment ("J" and "1J") under the name Felix Davis, with telephones registered in other names. Further surveillance, use of an informant, and an interview with the owner of the apartment building, provided reasonable grounds for the belief that the source of the narcotics was the Williams' duplex. For instance, Steward was seen on two occasions entering that apartment, after dialing the Williams' apartment phone number from a nearby public phone. On October 31, 1980, a week after the DEA agent's purchase of the heroin through Steward, defendants Porcelli and Guippone, previously convicted federal narcotics violators, were observed visiting the apartment, departing with a large closed paper bag and driving off with it. More visits to the Williams' apartment by Porcelli and Guippone followed.

Noting that Williams left his garbage in a green bag closed with a brown tape in the public corridor of his apartment to be brought out to the sidewalk for pick-up by the trash collector, DEA agents periodically removed some of the bags from the sidewalk, which yielded evidence identifying Williams and incriminating him and others. Among the items recovered from the trash was a note in Williams' handwriting dealing with a large-scale heroin transaction; records in code numbers of the financial accounts of various narcotics distributors, including payments and amounts owed; wrappers for mannite, a substance used to dilute heroin; traces of cocaine; and a record of large-scale narcotics sales.

Pen registers[5] connected to the Williams phone lines from outside his apartment recorded the making and phone numbers of calls to Porcelli, Steward and Harrison. Numerous persons were observed visiting the Williams apartment, including Harrison, Porcelli, Guippone, defendants Paul Jenkins and Bernard Henderson (from whom DEA agents had purchased heroin).

On February 18, 1981, Judge Robert J. Ward of the Southern District of New York, upon the application of the DEA agents, approved in writing by Sanford M. Litvack, Assistant Attorney General of the United States, supported by an affidavit attesting to the foregoing information, authorized the installation of two listening devices ("bugs") in the living room (Apt. J) located downstairs in the Williams duplex to record pertinent conversations "from the premises known as the first floor of duplex Apartment J," which was connected to the upstairs bedroom (known as "1J" by a large open stairway).[6] Thereupon police officers, posing as telephone repairmen, installed two bugs in the Williams living room, one in a wall jack near the floor, and the other in a telephone having a standard 7-8 foot cord, which was too short to permit a person to carry the phone upstairs to Williams' bedroom unless the cord was lengthened.

Over the next few months DEA agents recorded scores of conversations in the Williams apartment

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[5] A pen register is a device installed on a telephone line outside of the subscriber's home that records the electronic impulses made when outgoing calls are dialed. The device perforates a tape, indicating the date, time, and number dialed. The tape does not show whether the receiving telephone was answered, nor whether there was any conversation. The device on Williams' telephone also determined the origin of incoming calls. See J. Carr, *The Law of Electronic Surveillance*, § 3.02[3][b][ii] at 74 (1977 and Supp. 1979).

[6] The order was renewed on April 2, 1981 for an additional 30 days.

which, with the agents' surveillance and evidence already uncovered, clearly established the existence of the above-described continuous narcotics enterprise and the participation in it of all of the appellants except Haynes. Porcelli and Guippone visited the Williams apartment on numerous occasions, carried out packages and had discussions with Williams regarding purchases of heroin and cocaine, amounts of money paid and owed, and problems in obtaining payment from Harrison. On March 6, 1981, for instance, they visited Williams, received $30,000 from him, and arranged to supply him with three-quarters of a kilogram of cocaine. On March 16, 1981, Porcelli received $30,000 from Williams and agreed to hold an eighth of a kilo of heroin for him. Although Porcelli and Guippone suspended deliveries when they discovered that their car was being surveilled in mid-March 1981 after a visit to Williams, Porcelli on April 29, 1981, resumed discussions with Williams regarding methods of continuing narcotics sales on a more secure basis to avoid government surveillance. When Porcelli was arrested on May 31, 1981, he instructed his daughter to tell his son-in-law, "George" (Valenti) to "get rid of" the narcotics. There was evidence from which it could be inferred that Porcelli had kept a "stash" of narcotics at Valenti's house. When Guippone was arrested he had 300 rounds of ammunition in his car and he denied knowing anyone named Williams or Felix Davis. However, in his wallet Guippone had several telephone numbers for Harrison in Williams' handwriting, as well as the address of Williams' daughter.

The electronic evidence against Harrison was equally incriminating and, coupled with the agents' surveillance and other evidence, revealed that Harrison was one of Williams' distributors until he fell behind in payments of money owed Williams for narcotics supplied by Porcelli and Guippone, whereupon Harrison sought to deliver cocaine to Williams in lieu of cash to

repay his debt. For instance, on March 12, 1981, Harrison delivered 1-1/2 kilograms of cocaine to Williams, which proved to be unsatisfactory. Thereupon, on March 15, 1981, he delivered almost 2 kilos of cocaine to Williams. Williams was later overheard to say that on March 25, 1981, Harrison again delivered a kilogram of cocaine to Williams. When arrested, Harrison had one of Williams' phone numbers which he had obtained on a visit to the latter's apartment. A later search of Harrison's premises and car uncovered a sawed-off shotgun, hundreds of rounds of ammunition, some cocaine, and writings identified as heroin accounting sheets.

Onzelo Markum, Williams' younger brother, also known as "Junior," was taped discussing with Williams sales and deliveries of cocaine. For instance, on April 18, 1981, he advised Williams that he was bringing over "that girl" (code term for cocaine) and arrived one-half hour later, turning the cocaine over to Williams. His name was on Williams' narcotics accounting sheets. In addition to assisting his brother in the purchase and sale of narcotics he exchanged large amounts of cash proceeds ($30,000 to $40,000 a day according to Williams) at midtown banks.

Eric Nalven played several roles in the conspiracy, including that of narcotics tester and money launderer. When Agent Mitchell made his initial purchase from Steward he was told that he could use the back room of Nalven's bar to test the heroin sold. Although Nalven conceded purchasing cocaine from Williams for personal use in small gram amounts for $100 to $200, on several occasions he visited Williams' apartment and received cocaine in quantities associated with dealing rather than personal use, i.e., a purchase for $2,000 on one occasion and on other occasions amounts of cocaine that could be subdivided on others.

There was also evidence that Nalven acted as a money exchanger and narcotics-tester for Williams. The

latter stated on one occasion, in offering to pay $150 for every $10,000 laundered, that Nalven had been "getting rid of five or six [thousand] for me a week." The tapes further revealed that at times when Williams received narcotics from a supplier he would ask "Eric" to test it and advise the supplier of the results, and that Nalven showed Williams how to use a microscope, an instrument Williams used to test cocaine for purity. After Williams' arrest his microscope was found to have traces of cocaine on it. When arrested Nalven falsely told the DEA agents that he never used cocaine.

The evidence against appellant Clarence ("Legs") Haynes was almost entirely hearsay: records taken from Williams' trash referring to "Legs" along with others listed as narcotics distributors; mention by Williams of Haynes as the person who used defendant Bobby James (who was acquitted) as a narcotics courier; and Williams' end of a conversation, purportedly with Haynes, in which Williams asked Haynes to tell Gabe McMillan "about shirts (a code word for narcotics) that he had passed." The non-hearsay evidence against Haynes consisted of a short phone conversation with Williams in which the former asked "what's happening" and the latter replied "ain't nothing happening;" admissions by Haynes upon arrest that he was known as "Legs," and that he knew Williams and Harrison and had spoken with them on the telephone but not about narcotics; and an address book containing names of alleged drug traffickers and a narcotics price list, which was found in an apartment he shared with James who testified that the book belonged to him and that the entries were made by him, not Haynes.[7]

Appellant Willie Terry, who was tried separately before Chief Judge Motley, does not challenge the

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[7] McMillan, separately indicted, was convicted after a jury trial and sentenced to a 3-year term of imprisonment by Judge Robert W. Sweet. His conviction was affirmed by summary order on July 2, 1982. *United States v. McMillan*, No. 82-1101.

sufficiency of the evidence against him, which consisted of records of telephone calls by Williams to Terry's apartment; tape-recorded conversations between the two regarding efforts to purchase narcotics; records of "Terry" narcotics transactions found in Williams' trash; vials containing cocaine residue found on Terry when arrested; and a scale, small amount of marijuana and business card with "Davis" (Williams' alias) on it, all of which were seized from his apartment during a search incident to the execution of an arrest warrant.

Judge Owen, after evidentiary hearings, denied in reasoned opinions defendants' motions to suppress evidence derived from the retrieval and search of Williams' trash and the electronic surveillance of Williams' apartment and telephone. Likewise Chief Judge Motley, after an evidentiary hearing, denied in a written opinion Terry's motion to suppress the evidence seized from his apartment.

## DISCUSSION

### *A. CLAIMS COMMON TO ALL APPELLANTS*

#### *1. Searches of Williams' Trash*

Williams contends that the warrantless searches by DEA agents over a six-month period of his trash bags, which were set out for collection in sealed opaque bags, violated his reasonable expectation of privacy and that evidence so obtained tainted the legality of the electronic surveillance order.[8] We disagree.

In the absence of evidence indicating an intent by the former owner to retain some control over or interest in discarded trash, his placement of it for collection on a public sidewalk is inconsistent with the notion that he retains a privacy interest in it. His act is one of aban-

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[8] Although all appellants join in Williams' challenge to the legality of seizure of evidence from his trash, only Williams has standing to assert that the searches violated the Fourth Amendment. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978).

donment. *Abel v. United States*, 362 U.S. 217, 241 (1960); *United States v. Vahalik*, 606 F.2d 99, 101 (5th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); *United States v. Shelby*, 573 F.2d 971, 973-74 (7th Cir.), *cert. denied*, 439 U.S. 841 (1978); *Magda v. Benson*, 536 F.2d 111, 112 (6th Cir. 1976) (per curiam); *United States v. Mustone*, 469 F.2d 970, 972 (1st Cir. 1972); *United States v. Dzialak*, 441 F.2d 212, 215 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971); but see *People v. Krivda*, 5 Cal.3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), *remanded*, 409 U.S. 33 (1972), *aff'd on both state and federal constitutional grounds*, 8 Cal.3d 623, 105 Cal. Rptr. 521, 504 P.2d 457, *cert. denied*, 412 U.S. 919 (1973).

When plastic trash containers and their contents are picked up by the collector and carted to a public waste disposal area, common experience teaches that the former owner obtains no implicit assurance that the trash will remain inviolate or free from examination. Indeed, once the trash is discarded the former owner rarely has any further interest in it other than to be assured that it will not remain at his doorstep. In the rare instance when he desires to preclude inspection by others of private papers in his garbage he may do so by first shredding or burning them or by hand-delivering the papers to a garbage-grinding machine. We do not view the mere use of taped opaque containers as indicating an intent to retain a privacy interest; these containers, apparently the most commonly-available type sold, are obviously designed to assure tidiness in appearance rather than privacy.[9] Such containers are hardly safety deposit boxes. In any event, even though the presence of other circumstances may indicate an intent to retain a privacy interest in trash (e.g., written restrictions on containers or retention of containers on private

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[9] Since items found in closed containers during a lawful search do not require a separate warrant, *United States v. Ross*, ____ U.S. ____, 50 U.S.L.W. 4580, 4586 (June 1, 1982), *a fortiori*, there is no requirement to obtain a warrant to search sealed items that are discarded on a public street for collection.

property until collected), the circumstances in this case clearly evidence abandonment by Williams of his trash. Accordingly, we affirm the district court's denial of his motion to suppress the evidence seized from the trash searches.

*2. Challenges to Electronic Surveillance in Williams' Apartment*

All appellants challenge on several grounds the court-authorized electronic surveillance in Williams' apartment. Their first ground, that evidence derived from illegal trash searches was used to obtain the eavesdropping order, is rejected for reasons already stated and because the application for the order disclosed probable cause independent of the trash-derived evidence. See *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978).

Appellants next contend (1) that the affidavit supporting the original application for the room bugs was inadequate because it did not assert that all other less intrusive investigative techniques were unlikely to succeed as is required by 18 U.S.C. §§ 2518(1)(c) and (3)(c),[10] and (2) that the order renewing the authorization for an additional 30 days was invalid because the supporting affidavit was a mere "boiler-plate" repetition of the facts set forth in the earlier affidavit.

We hold that the affidavits were adequate. The original affidavit disclosed the standard investigative

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[10] Title 18 U.S.C. § 2518(1)(c) provides that an application for an order for interception of wire or oral communications shall include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Section 2518(3)(c) requires the judge in an ex parte order authorizing the interception to determine on the basis of the facts submitted by the applicant that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

procedures that had been tried and explained why their continued use would be unproductive. It explained that Williams rarely left his apartment and would not meet with someone he did not know; that a search of his apartment would not reveal his narcotics stash which he kept nearby; and that the co-conspirators previously contacted, Jones and Steward,[11] had become suspicious and refused to deal further with undercover agents. The affidavit further indicated the agents' inability through physical surveillance to establish the significance of the meetings between the suspects; a record of their conversations was therefore essential.

An affidavit describing the standard techniques that have been tried and facts demonstrating why they are no longer effective is sufficient to support an eavesdropping order even if every other possible means of investigation has not been exhausted. *United States v. Todisco*, 667 F.2d 255, 258-59 (2d Cir. 1981), *cert. denied*, 455 U.S. 906 (1982); *United States v. Vazquez*, 605 F.2d 1269, 1282 (2d Cir.), *cert. denied*, 444 U.S. 981 (1979), (quoting *United States v. Hinton*, 543 F.2d 1002, 1011 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976)). Agents are not required to resort to measures that will clearly be unproductive. When, as here, a defendant (Williams) conducts his narcotics business only on a face-to-face basis from his apartment, it is unnecessary for government investigators first to seek a wiretap before applying for an eavesdropping order since a bug, not a wiretap, would provide the evidence sought. Since the factual justification for the order had not changed at the time when an extension was sought, it was unnecessary to vary the specific facts, admittedly accurate, in the renewal application. *Todisco, supra*, 667 F.2d at 259.

Appellants next argue that the order should be invalidated because it was signed by an Assistant Attor-

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[11] Steward was charged in a separate indictment. Jones was an unindicted co-conspirator.

ney General who lacked authority. We disagree. On January 19, 1981, the last day of the administration of President Carter, the then Attorney General Benjamin Civiletti executed Order No. 931-81 pursuant to 18 U.S.C. § 2516(1)[12] designating the four Assistant Attorneys General in charge of the Criminal Division, the Tax Division, the Office of Legal Counsel, and the Antitrust Division, in that order, to exercise the power of the Attorney General, in his absence, to authorize appropriate applications for electronic surveillance by federal agencies. Each designee was authorized to exercise the power in the event all those listed ahead of him were "not in the District of Columbia or...otherwise not available."

Civiletti was replaced the following day, January 20, 1981, by Attorney General William French Smith when the new administration took office. On February 2, 1981, hold-over Assistant Attorney General Sanford M. Litvack, head of the Antitrust Division and fourth on Civiletti's priority list of assistants, authorized an application for court-ordered electronic surveillance of Williams' apartment. On February 27, 1981, Attorney General Smith issued his own designation order No. 934-81, which did not expressly redesignate the authorization of his predecessor.

Appellants first contend that the Litvack authorization on February 2 was inadequate because it failed to recite the necessary precondition to Litvack's exercise of power, namely that the three other Assistant Attorneys General with higher priority in the Civiletti order were absent or otherwise unavailable. We reject this contention. Litvack, a named designee whose high office gave

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[12] Title 18 U.S.C. § 2516(1) provides that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge ...for...an order authorizing or approving the interception of wire or oral communications..."

him statutory power to authorize electronic surveillance orders, is presumed to have properly exercised that power and the condition precedent is presumed to have been met unless the defendants offer evidence, apart from mere conjecture or speculation, to rebut this presumption. *United Staes v. Todisco*, 667 F.2d at 259; *United States v. Jabara*, 618 F.2d 1319, 1327 (9th Cir.), *cert. denied*, 446 U.S. 987 (1980); *United States v. Turner*, 528 F.2d 143, 151 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975). No such evidence was offered in this case.

Appellants further claim that Order No. 931-81 was invalid because Assistant Attorney General Litvack's power as a designee of Attorney General Civiletti had expired when Mr. Civiletti left office and was no longer responsive to the political process as required by *United States v. Giordano*, 416 U.S. 505, 520 (1974). This claim is meritless. Unlike *Giordano*, there is no suggestion here that Assistant Attorney General Litvack did not sign the order approving the application or that he was not specially designated by Mr. Civiletti. Administrative continuity requires that the designation by an outgoing Attorney General of Assistants to authorize electronic surveillance remain valid at least for a reasonable time after the Attorney General leaves office, even without an express redesignation by his successor. *Todisco*, 667 F.2d at 259 (citing *In re Weir*, 520 F.2d 662, 667 (9th Cir. 1975)); *United States v. Mallory*, 507 F. Supp. 99, 102 (D. Md. 1981). Otherwise the power of the office of Attorney General would in this important respect grind to a halt when an incumbent Attorney General departed and thereafter remain paralyzed until his successor was sworn in and acted. That the change in office resulted from a change in administration, with a possibly different electronic surveillance policy, does not alter the principle of administrative continuity when, as here, the incumbent Attorney General on February 27, 1981, impliedly ratified the designation of his predecessor, thereby eliminating the possibility that prior electronic surveillance policy could escape review by a

politically accountable official of the current administration.

Appellants next argue that the two eavesdropping devices ("bugs"), which were placed in the downstairs living room of Williams' duplex apartment, intercepted conversations that occurred upstairs in the apartment. Appellants argue that the interception of upstairs conversations violated both Judge Ward's order, which authorized interception of conversations "from the premises known as the first floor of duplex Apartment J," and the Fourth Amendment, which requires that search warrants "particularly describ[e] the place to be searched."

In the district court appellants originally contended that the bugs were unlawfully placed upstairs in violation of Judge Ward's order. They have abandoned this claim in the face of overwhelming contrary evidence. They now argue that the eavesdropping tapes should have been suppressed on the ground that since noises from Williams' TV set, claimed to have been at all times upstairs, and comments claimed to have been uttered upstairs were audible on the tapes the government must have violated the eavesdropping order by installing a bug in a downstairs phone with a long extention cord that might be carried upstairs and thus pick up conversations there. Alternatively they argue that even if upstairs noises were overheard by accident the entire tapes should have been suppressed. We reject both arguments.

After extensive oral hearings, in which Williams and the agents who installed the bugs testified, Judge Owen found that there were no bugs installed upstairs, that a bug with a standard 10-15 foot range was installed downstairs in a standard beige phone, described by the installer, Officer Meyers, as having a 7-8 foot cord, and that this installation was in compliance with Judge Ward's order. Although DEA agents, when they entered the apartment months later on May 31, 1981

(after the narcotics ring was broken by arrests), noted that the downstairs beige phone now had a 12 to 15 foot cord, this could not be attributed to the government (since the officers installed the phone on a 7 to 8 foot cord) but may have been the work of Williams, who admittedly extended the cord of one of the phones. Although Williams testified that the extension installed by him was not on the beige phone, the court stated that "the tortuous testimony of...Williams I utterly reject as false." These findings are not clearly erroneous.

In any event, since Judge Ward's order authorized interception of narcotics-related conversations "from" the downstairs it permitted the investigators to intercept such communications as might be audible by an unenhanced bug in the living room, even though they originated from the bedroom and could be heard downstairs because of the open stairway between the rooms.[13] Moreover, the faint television and other noises claimed (but not shown) to have emanated from the bedroom were insignificant. Judge Owen found that of nearly 200 taped conversations introduced into evidence, none appeared to have originated from upstairs, thus confirming evidence that the investigating agents took reasonable steps to limit interception to narcotics-related conversations originating in the living room downstairs. This satisfied the standard, which is that agents observe reasonable safeguards against excessive intru-

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[13] Cf. *United States v. Sellaro*, 514 F.2d 114, 124 (8th Cir. 1973), *cert. denied*, 421 U.S. 1013 (1975) (order authorizing interception of communications *from* telephones encompasses authorization to intercept both incoming and outgoing calls).

The government gave the agents monitoring the wiretap at Williams' apartment instructions to intercept only conversations *in* the living room. Judge Owen ruled that the government's "overly restrictive interpretation" of the scope of the agents' authority did not bind the court in construing Judge Ward's order. Even assuming the agents were under a statutory duty to minimize recordings of conversations beyond the scope of the authorization, the trial court found that they did so out of an excess of caution. See 18 U.S.C. § 2518(5).

sion. *Scott v. United States*, 436 U.S. 128, 139-43 (1978); *United States v. Tortorello*, 480 F.2d 764, 784-85 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); see also, *United States v. Rizzo*, 491 F.2d 215, 217 n.7 (2nd Cir.), *cert. denied*, 416 U.S. 990 (1974).

Our holding does not convert the electronic surveillance order into a general warrant in violation of the Fourth Amendment requirement that search warrants particularly describe the things to be seized. Here the order specifically authorized the interception of audible narcotics-related conversations by named individuals and some unknown within a designated area. This satisfied Fourth Amendment requirements. See *Steele v. United States*, 267 U.S. 498, 503-04 (1925), incorporated in Title III, 18 U.S.C. §§2518(1)(b)(i)-(iv) and 2518(4)(a)-(e).

*3. Custody of the Original Tapes*

We find equally meritless appellants' contention that in violation of Fed. R. Crim. P. 16(a)(1)(C)[14] and their constitutional rights to confrontation and due process they were denied access to the original tape recordings made from Williams' apartment. Appellants were given copies of the tapes which had been enhanced to promote audibility. In addition, the prosecutor made the original tapes available to appellants and their experts for analysis in his office. However, appellants declined this offer, seeking instead to analyze the original tapes outside the government's custody but with a government agent present. In the absence of any plausible evidence indicating an alteration or distortion of what was recorded on the tapes and in light of the trial

[14] Rule 16(a)(1)(C) provides:

> "Upon request of the defendant the government shall permit the defendant to inspect and copy...tangible objects ...which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial..."

court's finding of authenticity and accuracy, the request to remove this fragile evidence from the government's custody was unwarranted. *United States v. Fuentes*,563 F.2d 527, 532 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977).[15]

*4. The Court's "Community Impact" Instruction*

Over defense objection, the district court charged the jury:

> "If, ladies and gentlemen, you fail to find beyond a reasonable doubt that the law has been violated as to any charge by a defendant, you should not hesitate for any reason to return a verdict of acquittal. If, on the other hand, you should find that the law has been violated as charged by a defendant in any count, *you should not hesitate* because of sympathy of other reason *to return a verdict of guilty as a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be insured of this.*" (Emphasis added.)

Appellants contend that the italicized portion amounted to impermissible judicial advocacy, *Quercia v. United States*, 289 U.S. 466, 470-71 (1933); *United States v. Araujo*, 539 F.2d 287, 290 (2d Cir.), *cert. denied*, 429 U.S. 983 (1976), diverting the jury's focus from consideration of individual proof to questions of public policy. Cf. *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1073-74 (2d Cir. 1977).

Although we long ago held that the giving of a "community impact" instruction was not reversible error, *United States v. Witt*, 215 F.2d 580, 585 n.4 (2d

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[15] Even if, as Guippone and Porcelli claim, their conversations relating to gambling had been omitted from the recordings played to the jury, such omissions would not impugn the integrity of the tapes that were heard by the jury, which related to narcotics. Moreover, appellants made no objection at trial that the recordings were unfairly incomplete.

Cir.), *cert denied,* 348 U.S. 887 (1954), we have disapproved of similar statements when made by a prosecutor as tending to divert the jury from consideration of the evidence, *United States v. Barlin,* 686 F.2d 81, 93 (2d Cir. 1982). For the same reason we find no useful purpose to be served by the challenged instruction.[16] However, since the evidence in the present case was overwhelming against all defendants except Haynes, whose conviction is reversed on other grounds, and the instruction received no prominence, the error was harmless and did not deprive the defendants of a fair trial. *Barlin, supra,* 686 F.2d at 93; *United States v. Modica,* 663 F.2d 1173, 1182 (2d Cir. 1981), *cert denied,* 102 S. Ct. 2269 (1982); *United States v. Birnbaum,* 373 F.2d 250, 263 (2d Cir.), *cert denied,* 389 U.S. 837 (1967).

## B. *ADMISSION OF EVIDENCE OF DEFENDANTS' REFUSAL TO FURNISH PALM PRINTS*

Four appellants (Porcelli, Guippone, Harrison and Markum) contend that the trial judge erred in admitting testimony as to their refusal to supply palm prints as evidence of consciousness of guilt without permitting them to elicit that they had refused because they first wanted advice of counsel. Appellants argue that exclusion of evidence of their explanation violated the

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[16] The "community impact" charge cannot be equated with the "province of the jury" charge under which the jury is told:

> "You are to perform this duty [to try the issues of fact] without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict regardless of the consequences."

This charge has been approved by us as "standard" and proper, *United States v. Ramirez,* 482 F.2d 807, 816 (2d Cir.), *cert. denied,* 414 U.S. 1070 (1973). In contrast to the "community impact" instruction, it directs the jury *not* to consider public opinion. See 1 J. Devitt & C. Blackmar, *Federal Jury Practice and Instructions,* § 11.03, at 293 (3d ed. 1977).

"doctrine of completeness" as reflected in Fed. R. Evid. 106[17] because the evidence was admissible as proof of their "state of mind," Fed. R. Evid. 803(3).

On two occasions the government attempted pursuant to court order to obtain palm prints from Porcelli, Guippone, Harrison, Markum, and Williams, to determine whether any of their prints matched a latent palm print found on a paper bag containing heroin which was seized on the day of their arrests. Appellants refused, stating that they would not supply prints in the absence of their lawyers. At trial the government sought to introduce the refusal as evidence of appellants' consciousness of guilt and to explain why the government's fingerprint expert had not identified the latent print after that fact had been brought out by defense counsel. Appellants objected to the admission of the evidence unless they were permitted to elicit that they had contemporaneously expressed the desire to consult counsel. The district court ruled that the latter assertions were inadmissible hearsay and unnecessary for a fair understanding of the evidence of refusal, since the government might "take prints as a matter of right[]," and appellants had "no legal basis of any kind to refuse prints." The court indicated that the defendants could offer their explanation by their own testimony. At the close of trial the court instructed the jury that the refusal to supply palm prints could provide evidence of the defendants' consciousness of guilt.

The government has a right to obtain prints pursuant to a lawful custodial arrest, see *United States v. Doe*, 457 F.2d 895, 898-99 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973), without the presence of counsel,

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[17] Fed. R. Evid. 106 provides:

> "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

*United States v. Ash*, 413 U.S. 300, 313 (1973) (no right to counsel at post-indictment photograph display for purposes of allowing a witness to attempt an identification), and appellants' refusal to provide prints was admissible as evidence of consciousness of guilt. *United States v. Nix*, 465 F.2d 90, 93-94 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972).

Testimony regarding appellants' statements that they desired counsel would be excludable as hearsay, Fed. R. Evid. 802, unless admissible under an exception to the hearsay rule. Admission was not mandated by Fed. R. Evid. 106 (doctrine of completeness) since that rule applies only to writings, not oral statements; in any event Rule 106 does not render admissible evidence that is otherwise inadmissible. However, the evidence was admissible under the exception to the hearsay rule provided by Fed. R. Evid. 803(3),[18] since appellants' contemporaneous statements were relevant to the issue of their state of mind, i.e., whether they had a consciousness of guilt in refusing to furnish the prints or were acting in good faith.

It was therefore error to exclude the proof which appellants sought to elicit. However, the error was harmless and did not affect appellants' substantial rights in view of the overwhelming proof of their guilt. Fed. R. Crim. P. 52(a). Moreover, any prejudice was minimized by the fact that, notwithstanding the court's evidentiary ruling, defense counsel, in defiance of that ruling and despite the court's admonitions, sought by questions to convey to the jury that appellants had refused to furnish prints until they had advice of counsel.

### *C. INDIVIDUAL CLAIMS OF PORCELLI AND GUIPPONE*

Porcelli and Guippone contend that the evidence was insufficient to support their convictions of substan-

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[18] Fed. R. Evid. 803(3) excepts from the Hearsay Rule "[a] statement of the declarant's then existing state of mind..."

tive offenses (possession on March 6, 1981, of three-quarters of a kilogram of cocaine with intent to distribute (Count Seven) and possession of one-eighth of a kilogram on March 16, 1981 (Count Nine)). In view of the overwhelming evidence of guilt this claim is rejected. Examined in the light most favorable to the government, *Glasser v. United States, supra*,315 U.S. at 80; *United States v. Stirling*, 571 F.2d 708, 734 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978), the record shows that on March 6, 1981, Porcelli and Guippone agreed in response to Williams' request for "rock" (cocaine) to send him "three-quarters" of a kilogram of "Peruvian flake" (cocaine) they had received from a friend, which had come out "like feathers" (good quality). Similarly, on March 16, 1982, Porcelli agreed with Williams to "bring down the eighth" (eighth of a kilogram). The jury was entitled from the surrounding circumstances, including Williams' expressed need for heroin on the previous day (March 15), and his statement a day later (March 17) that he had paid $30,000 for "boy" (code name for heroin) the night before, to find beyond a reasonable doubt that the substance purchased from Porcelli on March 16 was heroin. There was also ample evidence that the quantities were kilograms, not grams for personal use, and that the crimes occurred within the Southern District of New York. *United States v. Panebianco*, 543 F.2d 447, 455 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

Their "boilerplate claim" that the proof disclosed multiple conspiracies rather than the single conspiracy charged, see *United States v. McGrath*, 613 F.2d 361, 367 (2d Cir. 1979), *cert. denied*, 446 U.S. 967 (1980), must also be rejected. The trial court's charge on conspiracy followed that approved by us, *United States v. Tramunti*, 513 F.2d 1087, 1107 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). The question of multiple or single conspiracies is one of fact, *United States v. Alessi*, 638 F.2d 466, 472 (2d Cir. 1980). Accepting the proof as we must in the light most favorable to the government, *United States v.*

*Murray*, 618 F.2d 892, 902 (2d Cir. 1980); *United States v. Armedo-Sarmiento*,545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977), the evidence was sufficient to permit the jury to find the existence of a single, large-scale, "chain-type" narcotics operation whose central link was Williams' apartment on East 89th Street.

Porcelli and Guippone agreed to further the aims of Williams' narcotics enterprise by supplying him with large quantities of heroin and cocaine for which they received large sums of money. They were aware of the size of the middleman Williams' operation, *United States v. Armedo-Sarmiento*, 545 F.2d at 790; *United States v. Panebianco*, 543 F.2d at 453, and knew their supply of narcotics would not stop with him. Indeed, they frequently discussed the fortunes of one of his distributors in the venture, Harrison, who was late in his payments. Thus, Porcelli and Guippone depended on Williams to collect money due them from Harrison, and Williams depended on Porcelli and Guippone to keep him in steady supply.

When Porcelli and Guippone refused to come to Williams' apartment for five weeks, suspecting danger, Williams could not obtain heroin. The three exchanged reciprocal warnings, reinforcing the existence of their interdependence and mutual assistance, thus warranting treatment of their dealings as a single business venture. *United States v. Tramunti, supra*, 513 F.2d at 1106. The temporary hiatus that occurred while the three waited for the danger to pass did not transform the single ongoing conspiracy into two conspiracies since there was nothing to indicate that any of them viewed their mutual dealings as having terminated. *United States v. Panebianco, supra*, 543 F.2d at 452. On the contrary, during the period when Porcelli and Guippone were lying low, Williams made repeated efforts, including a meeting with Porcelli, to arrange alternative meeting places to honor Porcelli and Guippone's demand, which was not that they cease doing business together, but that they meet in the Bronx. Similarly, the record is

that they meet in the Bronx. Similarly, the record is clear that appellants Porcelli and Guippone never withdrew from the conspiracy; they merely wanted to switch its locale. Consequently, their claim that statements of co-conspirators after March 16, 1981 should have been excluded is frivolous. *United States v. Schwenoha*, 383 F.2d 395, 396-97 (2d Cir. 1967), *cert. denied*, 390 U.S. 904 (1968); *United States v. Borelli*, 336 F.2d 376, 388-89 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).

We also reject as meritless Porcelli's contention that Judge Owen erred in ruling that he would, if Porcelli took the stand, admit Porcelli's 20-year old narcotics conviction on the issue of intent and guilty knowledge, Fed. R. Evid. 404(b). The ruling was correct in view of the claim of Porcelli's counsel in his opening statement that the telephone conversations with Williams related to gambling, not narcotics, and Porcelli's refusal to remove this issue from dispute by stipulating that the terms used in the taped conversations referred to narcotics. *United States v. Reed*, 639 F.2d 896, 906-07 (2d Cir. 1981); *United States v. Figueroa*, 618 F.2d 934, 941-43 (2d Cir. 1980); *United States v. Mohel*, 604 F.2d 748, 753-55 (2d Cir. 1979).

Porcelli and Guippone's remaining contentions are without merit. We therefore affirm their convictions.

*D. HARRISON'S CLAIMS*

Harrison contends that he was deprived of a fair trial because of prosecutorial misconduct. His first claim is that when Agent Hubert Shockley hesitated in making an in-court identification of him as the person seen entering Williams' apartment on March 15, 1981, to arrange delivery of two kilograms of cocaine, the prosecutor aided Shockley by using his eyes to point toward Harrison at the counsel table. Both the prosecutor and Shockley denied any such improper collaboration. Moreover, the court found first that any hesitation in making the identification was attributable to the fact

that Harrison's face was blocked from the witness by his counsel's open briefcase. Second, the court found that any change in the prosecutor's facial expression was caused by his astonishment when, just as the witness was looking for Harrison, defendant Haynes inexplicably rose to his feet, directing attention away from Harrison to himself. Since the question of what occurred in the courtroom in the presence of judge and jury is one of fact, we fail to find sufficient support, in view of the trial judge's comments, for the misconduct claim. In any event, there was abundant other independent evidence that Harrison was the speaker in the March 15 conversation with Williams regarding the delivery of cocaine.[19] Under the circumstances we also reject the claim that the trial judge abused his discretion in ordering Harrison after the incident to give a voice exemplar.

Nor is there any merit in the claim that the prosecutor acted improperly in questioning on cross-examination Harrison's "voice expert" witness, Louis Gerstman, regarding prior occasions when his testimony in other cases had been criticized by the court as unworthy of belief. Proof that a judge of the District of Columbia Superior Court before whom Gerstman had testified as an expert had found that Gerstman had "guessed under oath" was probative of the weight to be accorded to his testimony. Fed. R. Evid. 608(b), 613(a).[20]

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[19] This evidence included testimony of another government agent who had spoken to Harrison on the day of his arrest and identified the voice in the March 15 conversation as that of Harrison. Harrison also admitted that he was knows as "Harry," the name by which he was addressed by Williams at their March 15 meeting.

[20] Fed. R. Evid. 608(b) provides in relevant part:

> "Specific instances of the conduct of a witness, for the purpose of attacking...his credibility,...may...in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness..."

*(Footnote continued on following page.)*

Harrison's claim that the court erred in admitting identification testimony by Frank Lucas, a thrice convicted narcotics dealer, borders on the frivolous. The evidence was relevant to establish Harrison's residence, a material fact, and to identify his voice on the March 15, 1981 tape after Harrison had refused to stipulate that he was the speaker whom Williams greeted as "Harry." Lucas' allegedly prejudicial testimony regarding his own sordid history was elicited by Harrison's own counsel, over the government's objection. Harrison thus waived any possible claims based on the prosecutor's reference to the testimony in summation by his failure to object. *United States v. Clemente*, 640 F.2d 1069, 1081 (2d Cir. 1980), *cert. denied*, 454 U.S. 820 (1981).

We find no merit in Harrison's other contentions. His conviction accordingly is affirmed.

*E. MARKUM'S CLAIMS*

Markum claims that the testimony of the government witness Frank Lucas regarding Lucas' own narcotics history and attempts to bribe state court judges, which was adduced on cross-examination by Harrison's counsel over government objection, should have been excluded under Fed. R. Evid. 403 on the ground that its prejudicial impact outweighed its probative value, or that a limiting instruction as to Markum should have been given under Fed. R. Evid. 105, or a severance granted under Fed. R. Crim. P. 14. The claim is meritless. Lucas' testimony linked Harrison to the conspiracy. A limiting instruction was unnecessary since the impeaching testimony brought out on cross-examination related exclusively to Lucas and could not possibly

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*(Footnote continued from preceding page.)*

Fed. R. Evid. 613(a) provides:

> "In examining a witness concerning a prior statement made by him,...the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel."

have been attributed by the jury to Markum or any other defendant. Moreover, any possible error would have been harmless beyond a reasonable doubt in view of the abundant independent evidence of Markum's guilt, particularly his frequent and highly incriminating conversations with Williams about narcotics.

We also reject Markum's claim that the trial judge erred in considering Markum's perjured testimony in imposing sentence. *United States v. Grayson*, 438 U.S. 41, 50-51 (1978). His conviction is accordingly affirmed.

*F. NALVEN'S CLAIMS*

Relying mainly on *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), Nalven claims that the court erred in admitting a false exculpatory statement made by him upon his arrest. He asserts that the interrogation violated his Sixth Amendment right to counsel.

DEA agents, after arresting Nalven, read him his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and asked him whether he wished to waive them, to which he replied that he did not. He did not request a lawyer. Some 40 minutes later, at DEA headquarters, an Assistant U.S. Attorney again read to Nalven his *Miranda* rights and asked him if he had ever taken drugs. He replied that he had not. When further interrogation was attempted he responded that he would have nothing to say until he spoke with an attorney, whereupon questioning ceased. At trial, in rebuttal to Nalven's testimony that he bought small amounts of cocaine as a recreational user of cocaine, not a co-conspirator, *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977), the government sought to impeach him by introducing his earlier answer. The trial court concluded that in giving this answer Nalven knowingly waived his rights until he decided not to talk further before consulting counsel. We agree.

*Edwards v. Arizona, supra,* held only that it was impermissible to infer a waiver by an accused of his

Sixth Amendment right to counsel after he "has clearly asserted his right to counsel," 451 U.S. at 485. Further interrogation would then be inconsistent with *Miranda*. However, unless and until the accused asks for a lawyer he may waive his procedural *Miranda* rights, see *Michigan v. Mosley*, 423 U.S. 96, 104 n.10 (1975); *id.* at 109-11 (White, J., concurring). Prior to the accrual of the right to counsel, the standard for waiver is whether under the facts and circumstances of the case, including the accused's background and conduct, he understands the right in question and voluntarily intends to relinquish it. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

In the hearing as to the voluntariness of Nalven's statement, Nalven acknowledged that when he was read his rights by the Assistant United States Attorney he understood each one of them. He understood that he did not have to answer any questions, that anything he said could be used against him, and that he had a right to have an attorney before proceeding any further. Nalven confirmed, too, that he had acknowledged understanding those rights at the time he was advised of them. Since Nalven's rights were scrupulously respected at every stage, with interrogation terminated immediately upon his stating that he wanted to consult a lawyer, and there is no suggestion that he was subjected to lengthy questioning or other improper tactics, the finding of a waiver with respect to his statement concerning his use of narcotics must be upheld. *Michigan v. Mosley*, *supra*, 423 U.S. at 105-06

In any event, even if the admission of the false exculpatory statement had been error it would have been harmless beyond a reasonable doubt, since the statement formed but a minuscule part of the evidence against Nalven, which included repeated purchases of substantial amounts of cocaine from Williams, statements referring to Nalven's role as a tester and money launderer, and direct evidence of his assistance to Williams in the use of the microscope to examine cocaine.

Nalven also claims that the trial judge erred in admitting into evidence his licensed gun, a Walther PPK 9 millimeter pistol, and 300 rounds of hollowed out "dum-dum" bullets seized from his basement office at the time of his arrest. We disagree.

The trial court's determination that the probative value of admission of a weapon outweighs the danger of unfair prejudice will be upheld unless arbitrary or irrational. *United States v. Robinson*, 560 F.2d 507, 514-15 (2d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978). The government charged that Nalven let his bar be used for substantial narcotics transactions. Before the admission of the weapon, DEA agents testified that the bar was the site of their initial heroin purchase from Steward, that the agent was told then that the bar was "safe" and that the back room could be used to count money and check the "dope," and that the bar was later used by Nalven to test drugs for Williams. That the gun and ammunition were found in the basement rather than in the bar could have supported the conclusion that Nalven intended their use for protection, not of his bar, but of other business. While the possession of a licensed gun, standing alone, might have no relevance to illegal narcotics business, here the location of the weapon and the special type of ammunition found with it (deadly hollowed out "dum-dum" bullets) supported the inference that these were instruments of the narcotics trade. See *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir.), *cert. denied*, 429 U.S. 820 (1976).

Under the circumstances we cannot say that the trial judge's determination was irrational. Moreover, since the jury was aware that Nalven had a license for the gun there was less danger that jurors would be tempted to punish him for possession of the gun rather than for the offense charged. See *Robinson*, 560 F.2d at 513-14.

*G. TERRY'S CLAIMS*

Terry prudently does not question the sufficiency of the overwhelming evidence of his guilt. However, he does claim that the trial court erred in failing to suppress the set of scales (of the type used to weigh narcotics being cut or packaged), some marijuana, and a business card, all of which were seized from his apartment during the execution of a warrant for his arrest. Terry argues that the police lacked sufficient reason to believe that he was at home, and therefore they could not lawfully enter his apartment. *Payton v. New York*, 445 U.S. 573, 602-03 (1980). Because those items formed part of the basis for the subsequent issuance of a warrant for the search of his apartment, which uncovered other incriminating evidence, he contends that the search warrant was tainted. Terry also claims that the police extended their stay beyond the time necessary to secure the premises and that the seizure of the business card, which occurred some 15-20 minutes after the agents' arrival on the premises, was invalid. We disagree.

Armed with a valid arrest warrant, the agents had the right to enter the Terry apartment if they had a reasonable basis for believing Terry was there. *Payton v. New York*, 445 U.S. at 602-03; *United States v. Spencer*, 684 F.2d 220, 222-23 (2d Cir. 1982). They had sufficient information to justify their belief in Terry's presence. The telephone at the apartment was listed to Doris Terry. A man named Terry had spoken to Williams from that apartment. When the agents arrived at the apartment building, a 12-year old boy wearing a shirt with the name "Terry" on it told them his father and mother lived in the apartment and did not indicate that his father was not at home. Moreover, the agents arrived at the apartment at 8:45 A.M. on a Sunday morning, a time when they could reasonably believe that Terry would be home. We have rejected the contention that the police must first conduct a thorough investiga-

tion to obtain evidence of an arrestee's actual presence before entering his residence. *United States v. Manley*, 632 F.2d 978, 984 (2d Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

Once lawfully in the apartment the agents were entitled to make a limited security check of the premises, *id.*, 632 F.2d at 986; *United States v. Gomez*, 633 F.2d 999, 1008 (2d Cir. 1980), *cert. denied*, 450 U.S. 994 (1981). The crucial incriminating items—the scale, marijuana, and business card—were lawfully seized during the check because they were within the officers' plain view. *Washington v. Chrisman*, 455 U.S. 1, 5-6 (1982); *Spencer, supra*, 684 F.2d at 224. As long as agents did not enter because they had advance knowledge of these items, their discovery was inadvertent. See *United States v. Liberti*, 616 F.2d 34, 37 (2d Cir.), *cert. denied*, 446 U.S. 952 (1980). Terry argues that the scale could not have been in plain view because the DEA agent who seized it had to walk over to the box and look into it before determining that the box contained a scale. However, since the outside of the box itself, which was in plain view, bore the name "OHAUS," the name of a balance scale frequently used in narcotics dealing, and the open box revealed part of the scale with white powder residue on it, the agent's seizure of it was lawful. See *United States v. Mannino*, 635 F.2d 110, 115 (2d Cir. 1980).

After the initial pass-through of the apartment, and the discovery of the marijuana and scale, the agents were entitled to remain on the premises to secure the apartment from the destruction of evidence, *United States v. Manley*, 632 F.2d at 987, and to request the assistance of Terry's wife in locating him. The plain view seizure of the business card, which occurred during this period, was thus lawful. Accordingly Terry's conviction is affirmed.

## *H. INSUFFICIENCY OF THE EVIDENCE AGAINST HAYNES*

Haynes claims that since there was insufficient proof of his participation in the alleged conspiracy the trial court erred in admitting against him Williams' out-of-court hearsay statements and that the non-hearsay evidence against him was insufficient to permit the jury to find him guilty of conspiracy or of the substantive charges against him. We agree.[21]

Before a jury may consider against a defendant a conspiracy count that rests in part on hearsay statements of an alleged co-conspirator, the trial judge must be satisfied by a fair preponderance of the independent non-hearsay evidence that the defendant was in fact a member of the conspiracy. *United States v. Cicale*, 691 F.2d 95, 103 (2d Cir. 1982); *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Without the requirement of independent non-hearsay corroboration, co-conspirator hearsay "would lift itself by its own bootstraps to the level of competent evidence," *Glasser v. United States*, 315 U.S. 60, 74-75 (1942), and thus assume the conclusion to be proven, in this case Haynes' membership in the conspiracy.

The standard for independent proof of participation in the conspiracy is not as high as that needed to submit a charge of conspiracy to the jury, *United States v. Alvarez-Porras*, 643 F.2d 54, 57 (2d Cir.), *cert. denied*, 454 U.S. 839, (1981). The proof may be "totally circumstantial," *United States v. Ragland*, 375 F.2d 471, 477 (2d. Cir. 1967), *cert. denied*, 390 U.S. 925 (1968), and the court must view the evidence as a whole rather

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[21] Since we find this issue dispositive it is unnecessary for us to consider Haynes' other claims, e.g., that he was denied a fair trial by reason of the prosecutor's improper comments, or to remand for correction of his sentence which the government concedes to be improper by reason of the unauthorized imposition of a lifetime parole. *Bifulco v. United States*, 447 U.S. 381 (1980).

than consider individual items in isolation, *United States v. Di Palermo*, 606 F.2d 17, 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 915 (1980). Once a conspiracy has been proved to exist, the evidence needed "to link another defendant with it need not be overwhelming." *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir.), *cert. denied*, 446 U.S. 953 (1980) (quoting *United States v. Head*, 546 F.2d 6, 9-10 (2d Cir. 1976), *cert. denied*, 430 U.S. 931 (1977)).

Notwithstanding this lower standard the government must nonetheless show a "likelihood of an *illicit* association between the declarant and the defendant." *United States v. Ragland, supra*, 375 F.2d at 477 (emphasis added). Mere familiarity with a drug dealer does not make one a member of his conspiracy; nor does association with a conspirator provide a sufficient basis for the admissibility of hearsay statements of an alleged co-conspirator. *United States v. Steinberg*, 525 F.2d 1126, 1134 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Fantuzzi*, 463 F.2d 683, 690 (2d Cir. 1972); *United States v. Ragland, supra*, 375 F.2d at 477.

In the present case the independent non-hearsay proof consisted of (1) Haynes' admission that he was known as "Legs" and knew Williams and Harrison, (2) proof of a telephone conversation with Williams on April 9, 1981, and (3) proof that on April 25, 1981, Williams dialed a telephone number at Haynes' apartment house.[22] The government argues that the short April 9th

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[22] Scraps of paper retrieved from Williams' trash and Williams' notebook containing references to "Legs" are hearsay and accordingly may not be used to meet the *Geaney* threshold. The government understandably did not seek to admit these writings as business record exceptions to the hearsay rule, Fed. R. Evid. 803(6), absent proof of their reliability and accuracy as business records, either through a custodian or other qualified witness subject to cross-examination. *See United States v. McGrath*, 613 F.2d 361, 367-68 (2d Cir. 1979), *cert. denied*, 446 U.S. 967 (1980); *United States v. Baxter*, 492 F.2d 150, 164 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

conversation, in which the portion relied on by it was Haynes' question "what's happening Felix" and Williams' reply "ain't nothing happening Legs," was sufficient to meet the foregoing standards because one can infer that it was narcotics-related when considered with evidence that Williams was at that time out of drugs. We disagree.

Viewed in a light most favorable to the government and "not in isolation but in conjunction," *United States v. Geaney, supra*, 417 U.S. at 1121, the independent non-hearsay evidence proves only an acquaintanceship, not the likelihood of an illicit relationship between Williams and Haynes. The expression "what's happening?" is a widespread innocent salutation, the equivalent to "what's cooking?," "what's new with you?," or simply "hello, how are you doing?" Hearsay proof that co-conspirators may on two or three occasions have used the same phrase in the course of conversations with Williams involving narcotics hardly supports the sinister inference demanded by the government, in view of common knowledge that the salutation is widely used by innocent acquaintances. While "[j]udges are not required to exhibit a naivete from which ordinary citizens are free," *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977), neither are we permitted to read evil meaning into words usually having an innocent connotation, absent proof (of which there is none here) that they were part of a secret code.

Statements made by Williams on April 25, 1981, when he dialed a number at Haynes' apartment house, were hearsay as to Haynes since only Williams' voice was recorded and there is no non-hearsay proof that Haynes was the person on the other end of the line. However, even if, as the government argues, the Williams end of the conversation was admissible not to prove the truth of what he said but merely for the purpose of showing that the statement was made, Williams' statements that "you can send Bobby" and "[i]f Gabe

come, tell him something about shirts that he had passed," are too ambiguous to cross the threshold required to establish participation in a criminal conspiracy, *United States v. Cianchetti*, 315 F.2d 584, 587-88 (2d Cir. 1963). When evidence used to satisfy *Geaney* is "as consistent with innocence as with guilt," additional evidence linking the defendant to the conspiracy assumes "pivotal importance." *Alvarez-Porras, supra*, 643 F.2d at 57-58. Here, that all-important other evidence is totally lacking. The most that was developed by the evidence was an acquaintanceship between Haynes and Williams plus a *possible* inquiry by the former of the latter about narcotics. As against this meagre evidence the record shows that in the course of eight months of surveillance by trained agents, Haynes was never seen at Williams' apartment. His voice was heard on only one of some 200 taped conversations between Williams and his co-conspirators that were admitted into evidence.

For these reasons the jury should not have been permitted to consider the statements of co-conspirators concerning Haynes and the charges against him should have been dismissd for insufficiency of proof. Accordingly, we reverse his conviction and remand with directions to enter a judgment of acquittal of the charges against him.[23]

* * * * * * * * * * *

We have considered the remaining claims made by various appellants and find them to be without merit.

The judgment convicting appellant Haynes is reversed. The judgements convicting all other appellants are affirmed.

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[23] Haynes' conviction under 21 U.S.C. § 843(b) for using a telephone to further the conspiracy must be reversed in light of our ruling that the evidence is insufficient to convict Haynes of the predicate felony of membership in the conspiracy.

## Appendix B
## Opinion and Order of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

*Plaintiff,*

*against*

WILLARD WILLIAMS, a/k/a "Felix Davis," a/k/a "Trees," a/k/a "Mr. William," a/k/a "The Black Prince," ANTHONY MICHAEL PORCELLI, a/k/a "Porky," ROBERT ANGELO GUIPPONE, a/k/a "Sonny," SAINT JULIAN HARRISON, a/k/a "Harry" a/k/a "James Harrison," a/k/a "Mr. Simmons," a/k/a "Edward Carey," MAHLON JOSEPH STEWARD, a/k/a "Bunny," a/k/a "Little Lips", JOHN DOE, a/k/a "Jack," ONZELO MARKUM, a/k/a "Junior," CLARENCE HANES, a/k/a "Legs," JOHN DOE, a/k/a "Piggy," ERIC NALVEN, WILLIAM JENKINS, a/k/a "Pete," a/k/a "Pete Smalls," JOHN DOE, a/k/a "Pighee McCoy," SONYA SANTOS, MICHAEL CAVAGROTTI, CINDY CAVAGROTTI, SHEILA WILLIAMS, YOLANDA KING, a/k/a "Lonnie,"

*Defendants*

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Opinion and Order
81 Cr. 398

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December 1, 1981

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OWEN, *District Judge*

On February 18, 1981, Judge Robert J. Ward of this court found that there was probable cause to believe that a heroin ring was operating out of the apartment of defendant Willard Williams at 309 East 89th Street

in Manhattan. Pursuant to that finding, Judge Ward signed an order authorizing the placement of electronic listening devices ("bugs") in Williams's living room in order to obtain oral evidence of the commission of narcotics-related crime. The order expressly provided that the government might "intercept oral communications of...[defendants Williams, Porcelli, Guippone, Steward,] Jones, and others as yet unknown from the premises known as the first floor of duplex apartment J..." Standard bugs with a range of ten to fifteen feet were thereafter surreptitiously installed in the apartment, and for the following sixty days conversations intercepted by these bugs were monitored and tape-recorded by agents of the Drug Enforcement Agency ("DEA") who were stationed in an apartment across the street.[1] During this surveillance period, the agents recorded a considerable number of conversations of the defendants herein; it is undisputed that the subject matter of those conversations is within the scope of Judge Ward's order.

After indictment, defendants moved to suppress all the intercepted communications as the fruits of an unlawful general search. The theory of defendants' motion, which was based on defendant Williams's testimony and some stray language on the tapes themselves, was that certain of the bugged conversations took place in Williams's bedroom.[2] This, defendants argued, proved that there had been an illegal bug in the bedroom, which thereby voided the entire electronic interception and necessitated the suppression of all the tapes. Williams's bedroom, which at one time had been a separate apartment designated "1J", was located immediately above the living room and was connected to the living by a set of open stairs. The stairs rose

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[1] The order was renewed on April 2, 1981 for an additional thirty days.

[2] Williams apparently has medical problems with his feet and therefore spent a lot of his waking time on his bed.

from the living room through a large aperture to the bedroom floor at a point a few feet from Williams's bed and close to a projection television screen.

I held several days of hearings on the "bug-in-the-bedroom" issue. I now find as a fact that there was no bug in defendant Wialliams's bedroom. I find that two bugs were placed in the living room by New York City Police officers posing as telephone repairmen. One bug was placed in the telephone wall "jack" located on the baseboard of the wall; the other was placed in the base of a standard telephone with a standard wall cord connecting it to the bugged jack. I also find that, for his own convenience, Williams kept this telephone on one of the middle-to-upper steps of the stairway, which in fact was no more than a few feet from his bed and the projection television screen.[3] Even while on the stairs however, the telephone, with the bug inside it, remained in the living room. Accordingly, I conclude that the bug was at all times located in compliance with the order of Judge Ward.

As it became apparent during the hearing that there was no bug in the bedroom, defendants shifted the grounds of their suppression motion. They now contend that the agents were intercepting conversations which they knew or should have known were taking place in the adjoining upstairs bedroom – albeit only a few feet from the bug -- and that the agents had a duty at that point either to stop monitoring or to come back to the court for an extension of the limits of the eavesdropping order. Concededly, they did neither.

To pursue this new inquiry, defendants now seek to interrogate the monitoring agents as to their states of mind during the two months of bugging in order to

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[3] Williams had two other phones with different phone numbers which were both located upstairs. Neither phone had any involvement whatsoever with the matter before me.

determine whether, at the time an agent was monitoring any particular conversation, that agent knew or had reason to believe that that conversation was coming from the bedroom.[4] Of the some twenty monitoring agents, defendants demand, at least at first, that five be produced. Contending that the seizure of any conversations from the bedroom was prohibited, defendants argue that if an agent or agents can be shown to have had an awareness that various conversations came from the bedroom, then all the fruits of the electronic eavesdropping must be suppressed.[5]

Upon reading the court's order itself, in light of the language of and the principles inherent in both the Constitution and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, I decline to pursue this line of inquiry, and I do not, nor need I, make any findings of fact in this area. In the order authorizing the bugging, Judge Ward found that there was probable cause to believe that Williams was trafficking in narcotics and that his living room was being used for that purpose. Based on this finding, Judge Ward authorized the DEA agents to install bugs in the living room. They did exactly that. They were told that they could intercept "from" that living room oral communications pertaining to narcotics activity. Again,

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[4] The government recorded over 1900 individual conversations.

[5] Defendants seek to bolster their legal position by reference to certain oral and written instructions which the government gave to the monitoring agents and which direct in essence that only conversations in the living room were to be intercepted. The government's overly restrictive interpretation of the scope of the agents' authority does not, however, establish the law or bind this court.

they did exactly that. The communications which they recorded from that living room were audible in the living room and thus were geographically within the scope of the order. Consequently, whether or not an agent or agents knew or had reason to believe that the conversation being bugged at any given time came from the adjacent bedroom is irrelevant. A rule mandating the suppression of incriminating conversations which were audible in the very room which a court had designated for the placement of a bug would, in my opinion, make a mockery of the Constitution and Title III.[6] The Fourth Amendment assures "the right of the people to be secure in their...houses against unreasonable searches and seizures,..." It was designed to protect the citizenry from the abuse of power by the sovereign. It was not designed to protect an alleged narcotics dealer from a prosecution based upon his incriminating conversations which were overheard by a court-authorized listening device located in exactly the room in which the court permitted the interception to occur.

In sum, I conclude that the bugs were lawfully situated in the living room and that any conversation dealing with narcotics trafficking which they overheard, whether or not the agents knew it was occurring in an adjoining room, was lawfully intercepted and is therefore admissible on the trial herein. Accordingly, leave to defendants to pursue this new line of inquiry is denied, and defendants' motion to suppress the fruits of

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[6] For example, consider a conversation in which one speaker is in the living room and the other is just across the doorsill in the dining room and statements of both are picked up by the bug. Is the government to be denied such evidence of narcotics trafficking, or denied half of it? Is the boundary between lawful and unlawful eavesdropping a doorsill which a monitoring agent cannot even see?

I note that this is not a case where the bug employed was so sensitive that it could pick up conversations that were not audible to the human ear. That may present a different issue, but such an issue is not now before me.

the electronic surveillance authorized by Judge Ward is denied in its entirety. The trial in this case will commence on January 14, 1982 at 10:00 a.m.

The foregoing is so ordered.

s/s Richard Owen
United States District Judge

Dated: New York, N.Y.
December 1, 1981

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*Appendix B*
*Opinion and Order of United States District Court*

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*Appendix B*
*Opinion and Order of United States District Court*

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## Appendix C
## Opinion and Order of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,
*Plaintiff,*

*against*

WILLARD WILLIAMS, et al.,
*Defendants.*

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Opinion and Order
S 81 Cr. 398

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December 3, 1981

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*Appendix C*
*Opinion and Order of United States District Court*

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*Appendix C*
*Opinion and Order of United States District Court*

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OWEN, *District Judge*

During the course of the hearings on the motion of Willard Williams and others to suppress the fruits of an electronic eavesdropping in Williams's apartment in the spring of 1981, a subsidiary issue was raised as to whether there was an authorized, and hence an illegal, wiretap on the very telephone that was used as part of the circuitry for the bug. (*See* this court's opinion

of December 1 denying the motion to suppress the fruits of that eavesdropping. Familiarity with that opinion is herein presumed.)

The basis for the defendant's claim of an illegal wiretap is that on certain of the bugging tapes, one can hear both the person making the telephone call and – albeit much more faintly – the caller. This, counsel contends, is evidence that there was an illegal wiretap bugging the telephone conversation itself.

I disagree with counsel's contention. The phenomenon of the caller's faint voice being heard on the tapes is easily explained by the fact that one of the bugs was in the base of the telephone itself. It was conceded, even by defendants' alleged expert, one Shawky Aziz (whose testimony in all other material respects I do not credit), that if the earpiece of the phone is held the slightest distance from the ear, the words of the caller would be audible in the room and thus be picked up by the bug. This is obviously what happened. Indeed, the government demonstrated this phenomenon to me by calling my courtroom phone from a phone booth in the corridor.

Given the foregoing, I find that there was no such wiretap, let alone an illegal wiretap of the telephone No. (212) 876-3282. Thus defendant's allegation of illegality is dismissed.

So ordered.

s/s Richard Owen

United States District Judge

Dated: New York, NY
December 3, 1981

## Appendix D
## Opinion and Order of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,
*Plaintiff,*

*against*

WILLARD WILLIAMS, et al.,
*Defendants.*

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Memorandum and Order
81 Cr. 398

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April 2, 1982

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OWEN, *District Judge*

In support of the Memorandum and Order of January 15, 1982 herein, I make the following Findings of Fact and Conclusions of Law.

The telephone that had the bug in it, I continue to find, was at all times jacked in the living room downstairs in Willard Williams' apartment. The torturous testimony of Willard Williams I utterly reject as false. The photographs that Williams presented to the Court, defendants Exhibits A 1-4, do not support this testimony at all, although it was so suggested prior to the hearing. The government photographs, Exhibits 21 A and B, indeed clearly reveal the contrary and are wholly supportive of the Findings of Fact and Conclusions heretofore reached in my Opinion and Order of December 1, 1981.

Given the foregoing, the Memorandum of January 15, 1982 is confirmed as the Order of this Court.

s/s Richard Owen
United States District Judge

Dated: April 2, 1982
New York, NY

## Appendix E
## First Eavesdropping Order and Excerpts of Government's Supporting Papers

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS

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Order

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AUTHORIZING INTERCEPTION OF ORAL COMMUNICATIONS

TO: SPECIAL AGENTS OF THE DRUG ENFORCEMENT ADMINISTRATION, UNITED STATES DEPARTMENT OF JUSTICE

Application under oath having been made before me by Lawrence F. Ruggiero, an Assistant United States Attorney for the Southern District of New York, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an Order authorizing the interception of oral communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) There is probable cause to believe that WILLARD BERNARD WILLIAMS, a/k/a "Felix," a/k/a "Mr. Davis," a/k/a "Felix Davis," a/k/a "Trees," a/k/a "Black Prince," a/k/a "Mr. William," ANTHONY MICHAEL PORCELLI, a/k/a "Porky," ROBERT ANGELO GUIPPONE, a/k/a "Sonny," MAHLON JOSEPH STEWARD, a/k/a "Bunny," and LOUIS JONES and others as yet unknown, have committed and are committing offenses listed in Section 2516 of Title 18, United States Code, involving the importation and distribution of narcotic drug controlled

substances, the possession of such substances with intent to distribute, the use of wire facilities to aid in distributing and possessing with intent to distribute narcotic drug controlled substances, a conspiracy to import and distribute and to possess with intent to distribute narcotic drug controlled substances, and engaging in a continuing criminal enterprise of buying, selling and otherwise dealing in narcotic drug controlled substances in which five or more persons are participating and from which substantial income and resources are being obtained in violation of Sections 841, 843(b), 846, 848, 952, 960 and 963 of Title 21, United States Code; as well as receiving income from a pattern of racketeering activity, in violation of Title 18, United States Code, Sections 1962 and 1963.

(b) There is probable cause to believe that particular oral communications of WILLARD BERNARD WILLIAMS, a/k/a "Felix," a/k/a "Mr. Davis," a/k/a "Felix Davis," a/k/a "Trees," a/k/a "Black Prince," a/k/a "Mr. William," ANTHONY MICHAEL PORCELLI, a/k/a "Porky," ROBERT ANGELO GUIPPONE, a/k/a "Sonny," MAHLON JOSEPH STEWARD, a/k/a "Bunny," and others as yet unknown concerning these offense will be obtained through the interception of oral communications, the authorization for which is herewith applied for. In particular, these oral communications will concern, *inter alia*, importation and distribution of narcotic drug controlled substances, the proceeds of such importation and distribution, the locations at which the narcotics are stored, the means and manner of delivery of the narcotics, the identity of the participants in the conspiracy and enterprise, and the precise nature and scope of the illegal activity. In addition, the communications are expected to constitute admissible evidence of the commission of the above-described offenses.

(c) There is probable cause to believe that the first floor of duplex apartment J located at 307 East 89th

Street, New York, New York has been used by, is being used by and will be used during the period of interception applied for herewith by WILLARD BERNARD WILLIAMS, a/k/a "Felix,", a/k/a "Mr. Davis," a/k/a "Felix Davis," a/k/a "Trees," a/k/a "Black Prince," a/k/a "Mr. William," ANTHONY MICHAEL PORCELLI, a/k/a "Porky," ROBERT ANGELO GUIPPONE, a/k/a "Sonny," MAHLON JOSEPH STEWARD, a/k/a "Bunny," and others as yet unknown in connection with the commission of the above-described offenses.

(d) Normal investigative procedures either have been tried without success or reasonably appear unlikely to succeed if tried.

WHEREFORE, it is hereby ordered that special agents of the Drug Enforcement Administration are authorized, pursuant to application authorized by the Assistant Attorney General in charge of the Antitrust Division, United States Department of Justice, the Honorable Sanford M. Litvack who has been specially designated by the Attorney General to exercise the power conferred on him by Section 2516 of Title 18, United States Code, to intercept oral communications of WILLARD BERNARD WILLIAMS, a/k/a "Felix," a/k/a "Mr. Davis," a/k/a "Felix Davis," a/k/a "Trees," a/k/a "Black Prince," a/k/a "Mr. William," ANTHONY MICHAEL PORCELLI, a/k/a "Porky,' ROBERT ANGELO GUIPPONE, a/k/a "Sonny," MAHLON JOSEPH STEWARD, a/k/a "Bunny," LOUIS JONES, and others as yet unknown concerning the above-described offenses from the premises known as the first floor of duplex Apartment J, located at 307 East 89th Street, New York, New York. Such interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained but shall continue until communications are intercepted which reveal the manner in which WILLARD BERNARD WILLIAMS, a/k/a

"Felix," a/k/a "Mr. Davis," a/k/a "Felix Davis," a/k/a "Trees," a/k/a "Black Prince," a/k/a "Mr. William," ANTHONY MICHAEL PORCELLI, a/k/a "Porky," ROBERT ANGELO GUIPPONE, a/k/a "Sonny," MAHLON JOSEPH STEWARD, a/k/a "Bunny," and LOUIS JONES and others as yet unknown, participate in the above described offenses and which reveal the identities of their confederates, their places of operation and the nature scope and extent of the above described offenses, or for a period of thirty (30) days from the date of this order, whichever is earlier.

IT IS FURTHER ORDERED, upon request of the applicant, that the New York Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates. To avoid prejudice to this criminal investigation the said communication carrier, its agents, and employees are hereby ordered not to disclose or cause the disclosure of this Order or the interception which it authorizes to any person other than those of its agents and employees who require said information to accomplish the interception of communications hereby ordered. In particular, said carrier, its agents and employees shall in no event make such disclosure to a telephone subscriber, any potential interceptee or participant in the offenses named in this Order.

IT IS FURTHER ORDERED that surreptitious entry into the premises known as the first floor of Apartment J, located at 307 East 89th Street, New York, New York, is authorized for the purpose of installing,

maintaining, and removing any electronic interception devices to be utilized in accomplishing the oral interception.

PROVIDING FURTHER that this authorization to intercept oral communications shall be executed as soon as practicable after signing of this order, and shall be conducted in such a way as to minimize the interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorization objective or, in any event, at the end of 30 days from the date of this order.

PROVIDING ALSO that Lawrence F. Ruggiero or another Assistant United States Attorney for the Southern District of New York shall provide this Court, or cause to be provided this Court, a report on the Fifth (5th), Tenth (10th), Fifteenth (15th) Twentieth (20th) and Thirtieth (30th) days following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. If any of the aforementioned reports become due on weekends or on holidays said reports will then become due on the next business day thereafter.

s/s Robert J. Ward

United States District Judge

Dated: New York, New York
February 18, 1981
10:40 A.M.

*Appendix E - First Eavesdropping Order and Excerpts of Government's Supporting Papers*

**Excerpts From Government's Instructions Annexed To Foregoing Eavesdropping Order**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS

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81 Misc. Cr.

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Instructions

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To all agents participating in the monitoring of conversations of WILLARD BERNARD WILLIAMS, a/k/a "Felix," a/k/a "Mr. Davis," a/k/a "Felix Davis," a/k/a "Trees," a/k/a "Black Prince," a/k/a "Mr. William," ANTHONY MICHAEL PORCELLI, a/k/a "Porky," ROBERT ANGELO GUIPPONE, a/k/a "Sonny," MAHLON JOSEPH STEWARD, a/k/a "Bunny" and LOUIS JONES and others as yet unknown occurring inside the first floor of duplex Apartment J, 307 E. 89th Street, New York, New York.

1. Before participating in any interception you must read carefully the Order of the Court authorizing the interception of communications so that you understand its directions. When you have read that Order and these Instructions, you shall sign below. At least one copy of the Order and one copy of these Instructions should be posted in the plant at all times during the operation of the electronic surveillance.

2. Your objective is to execute the Order, recording only those conversations which are specifically desig-

nated and minimizing the interception of non-pertinent or privileged communications.

3. The law makes no distinction between "intercepting," "listening to," "overhearing," or "monitoring," (hereinafter "intercepting") and "recording" a conversation. Courts generally regard intercepting oral communications through the use of a "bug" like any other search warrant: it authorizes a limited "search," and limited "seizure" of evidence. *If a conversation is intercepted but is not recorded, nevertheless, it has been seized.*

4. If you listen to every conversation occurring on the first floor of duplex Apartment J at 307 East 89th Street, the fruits of your investigation will be suppressed unless all the conversations were pertinent and were not privileged. *We have to establish that we neither listened to nor recorded conversations we had no right to overhear.* No machine is to be left unattended on automatic. "Minimization" requires that the agents make a good faith determination of whether or not each conversation is relevant to those described in paragraph 6 below.

5. Anytime a conversation or any part thereof is monitored it must be recorded. If the machine has a separate monitor switch, such switch is not to be activated unless the machine is recording. However, if the machine malfunctions or a tape has just run out, monitoring is permissible while the situation is being remedied. Be sure to report any overheard but non-recorded conversation in the logs as close to verbatim as possible, and to note the reason for not recording. Also, immediately inform the Supervising Agent and the Supervising Attorney about the situation.

6. CONVERSATION WHICH MAY BE LISTENED TO. We have authority to intercept certain wire communications of WILLARD BERNARD WILLIAMS, a/k/a "Felix," a/k/a "Mr. Davis," a/k/a "Felix Davis,"

a/k/a "Trees," a/k/a "Black Prince," a/k/a "Mr. William," ANTHONY MICHAEL PORCELLI, a/k/a "Porky," ROBERT ANGELO GUIPPONE, a/k/a "Sonny," MAHLON JOSEPH STEWARD, a/k/a "Bunny" and LOUIS JONES

* * * * *

***conversation involving another *serious* crime -- for example, assault, robbery, homicide, hijacking -- listen to and record that conversation. *Then notify the Supervising Attorney immediately.*

13. CONVERSATION IN WHICH OUR NAMED SUBJECTS ARE NOT PARTICIPANTS

We have authority to intercept pertinent conversations in which our named subjects are not participants because we do not know and have not identified all the people who use the first floor of duplex Apartment J, 307 East 89th Street, New York, New York, in connection with the ILLEGAL ACTIVITIES. You must be extremely careful, however, when intercepting conversations in which none of the named subjects are participants to avoid intercepting non-pertinent conversations.

It is important that you attempt to identify by voice the named subjects of this interception and, as well, to identify by voice other speakers who may frequently use the first floor of duplex Apartment J, 307 East 89th Street, New York, New York, so that the patterns of innocence and involvement mentioned earlier can be recognized and our monitoring can be adjusted in accordance with them.

14. NEW SUBJECTS

One of our stated and authorized purposes in conducting this investigation is to identify our subjects' co-conspirators, accomplices, agents, victims, suppliers, deliverers and recipients involved in the ILLEGAL

ACTIVITIES. As soon as any such individual is identified, the Supervising Attorney should be notified immediately.

15. PRIVILEGED COMMUNICATIONS

We may not listen to *any* conversation which would fall under any legal privilege. The general categories of privileged

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**Excerpts From First Five-Day Report**

U.S. DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK

February 23, 1981

Honorable Robert J. Ward
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: First Five Day Report Pursuant To
Your Order Of February 18, 1981
Authorizing Interception of Oral
Communications

Dear Judge Ward:

I submit this report pursuant to your Order of February 18, 1981 authorizing the interception of oral communications occurring in the first floor of duplex Apartment J, which is located at 307 East 89th Street, New York, New York.

On February 17, 1981 I visited the Drug Enforcement Administration regional office on West 57th

Street, New York, New York and personally instructed Special Agents of the Drug Enforcement Administration who are monitoring this electronic surveillance, concerning their responsibilities to minimize non-pertinent intercepts. I have also provided them with extensive written instructions on minimization, a copy of which I gave to the Court on February 18, 1981. Before participating in the electronic surveillance, each agent is required to read the Court's Order (a copy of which is posted at the plant) and my instructions on minimization.

* * * * *

On February 18, 1981, during mid-afternoon two microphones were installed in Williams' apartment. The microphones were installed by New York City Police officer John Murray who was assigned to DEA by the Police Department to install the microphones. From the outset conversations intercepted were inaudible because of static on the line.

No interceptions were attempted from midnight to approximately 11:18 AM on February 19, 1981 because of the above mentioned technical problem. At 11:18 AM Anthony Porcelli visited Williams however, the technical problem continued and their conversation does not appear to be audible. Other conversations were intercepted but were also inaudible for the same reason. At approximately 12:45 PM interception was suspended because of the technical problem.

At approximately 5:11 AM on February 20, 1981 an unidentified male visited Williams and discussed the "quality" of something. From 10:09 AM to 10:31 AM and 11:00 AM to 1:57 PM electronic surveillance devices were shut down as attempts were made to eliminate technical problems. Meanwhile one of the microphones placed in Williams' apartment was replaced by New York City Police officer Bruce Meyer who was assigned

to DEA for that purpose. The technical problem causing the static was eliminated by mid-afternoon. At approximately 9:13 PM Mahlon Steward visited Williams and was heard to count money.

On February 21, 1981 a black male visitor told Williams the coke was nice. Later a female visitor mentioned heroin to Williams. Later, while speaking to someone on the telephone Williams spoke of "boys" and "girls", the code words for heroin and cocaine. In another conversation a male asked Williams for manitol and mannite (cutting agents). Finally Williams was heard asking a visitor if "it" was any good while the visitor responded with conversation about controlling hallucinations.

On February 22, 1981 there appears to have been eight pertinent conversations. At approximately 12:03 PM Anthony Porcelli visited Williams and discussed someone named Eric. At approximately 7:02 PM a currently unidentified visitor told Williams in substance that 'he does not carry a white one, do you know what I mean.' Williams then appeared to be counting out money and mentioned "two ounces". Shortly thereafter at approximately 7:19 PM a male visitor argued with Williams about money. As frequently happens, portions of the conversation were obscured by dogs barking. Williams has three dogs in his apartment. During the last part of the conversation the visitor spoke about selling "two" or "three". Besides these conversations with others in the apartment Williams also had five apparently pertinent conversations with people on the telephone. During those conversations Williams spoke in a guarded fashion and while codes seemed to have been used by Williams, the conversations are vague. I noticed that in only two of the non-pertinent telephone conversations Williams had with unidentified others, the voice of the speaker can be faintly heard in the background. Until the reason why another's voice is

heard in a telephone with Williams and until that condition is eliminated, Williams telephone conversations will not be intercepted at all if the other party to that conversation can be heard.

Very truly yours,

JOHN S. MARTIN, JR.,
United States Attorney

By: _____
LAWRENCE F. RUGGIERO
Assistant United States Attorney
Telephone: 791-1940

**Excerpts From First Ten Day Report**

U.S. DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK

February 27, 1981

Honorable Robert J. Ward
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: First Ten Day Report Pursuant To
Your Order of February 18, 1981
Authorizing Interception of Oral
Communications

Dear Judge Ward:

I submit this report pursuant to your Order of February 18, 1981 authorizing the interception of oral

communications occurring in the first floor of duplex Apartment J, which is located at 307 East 89th Street, New York, New York.

On February 17, 1981 I visited the Drug Enforcement Administration regional office on West 57th Street, New York, New York and personally instructed Special Agents of the Drug Enforcement Administration who are monitoring this electronic surveillance, concerning their responsibilities to minimize non-pertinent intercepts. I have also provided them with extensive written instructions on minimization, a copy of which I gave to the Court on February 18, 1981. Before participating in the electronic surveillance, each agent is required to read the Court's Order (a copy of which is posted at the plant) and my instructions on minimization.

* * * * *

On February 23, 1981, while speaking to an unknown person on the telephone Williams mentioned "coke". At 4:22 AM, in a conversation with an unknown male visitor, "much money" is mentioned as well as the phrase "a lot of trouble". At 5:10 AM, during a conversation with a number of females, one of the women spoke to Williams of someone doing something with LSD. One woman seems to refer to a Jennifer and Geraldine. At 7:37 AM in a conversation with an unknown female visitor, Williams indicates something to the effect that time passes when you're sniffin that shit. At 1:00 PM, Williams, in a conversation with an unknown female visitor, indicates that if she's afraid she shouldn't fuck around and not to test it, that if anything happens to him, he will accept the consequences and that he knows he is doing wrong. At 1:55 PM, Williams asks a unknown male visitor where he expected him to get a gram. Later that day, at 2:38 PM during a partially inaudible conversation with an unknown male visitor, Williams states that the visitor owes him something and they discuss various denominations. At 9:53,

during a long conversation with a male visitor, Williams and he plan to launder the money at a number of banks. Williams talks about someone he knew in person who was an enforcer for the mob. At 11:50 Williams spoke to an unknown caller about "Q's" and "Quays". Additionally, a New York City Police Officer assigned to DEA by the Police Department, entered Williams' apartment to repair the bug.

On February 24, 1981, at 2:27 AM during a telephone conversation with a female named Nancy, Williams spoke of his apprehension in meeting a strange female and not wanting people waiting outside his apartment or in cabs while others visit him because it draws too much "heat and attention." At 11:45 AM, a white male visitor believed to be Michael Cavagrotti agreed to launder money for Williams. He was followed to several banks and back to Williams' apartment. Williams and Cavagrotti then talked of laundering money. Additionally Williams appears to have given Mike $150. There was further talk of "Snowblind". At 2:47 PM, an unknown female visitor spoke of money that fell out of her pocket on her way over here. Williams spoke of pouring dope in and being careful who she meets now. At 3:25 PM Williams is told by an unknown white male visitor to wait 30 days for the shipment.

At 10:51 PM, when an unknown female visitor referred to "junk", Williams indicated for her to close her mouth. Someone goes outside.

On February 25, 1981 at 12:04 AM during a conversation with an unknown female Williams indicated that he might get something for her between now and next Saturday and that them other two girls might have something tonight but they didn't call.

At 10:30 PM, a middle aged black male visitor using a 1978 Cadillac registered to Pihee McCoy in Montclair,

New Jersey apparently asked Williams for a sample and was told there was no such thing as a sample. Williams said he would see what he could do for the visitor tomorrow.

On February 26, 1981 at 3:45 PM in a telephone conversation with an unknown caller Williams indicated that he would make the move tomorrow. At 8:24 PM Williams said to an unknown caller "Maybe tonight or tomorrow. I'm on the way. What about the boy? What does he got for me? Tell him to send that, then come on, then call me and let me know if you're on your way."

At 9:22 PM Williams told an unknown caller that he is waiting on someone and that Williams will call in a few days.

On February 23, 1981 I instructed Agents not to monitor calls because they were picking up faint and inaudible conversations by other party. Agents spoke to technical expert who said they were picking up conversations because of atmosphere conditions. Agents were told that the problem could be solved by shutting off telephone microphone during the call. Therefore on February 26, 1981, I told agents they could monitor calls from wall microphone to see if they were picking up other side of conversation. Several calls were monitored with the other side of conversation still being heard faintly. On February 27, 1981, I told Agents to cut recording level down to zero when listening to phone conversations so that we would only pick up Williams' voice and not the sound of other persons voice.

Very truly yours,

JOHN S. MARTIN, JR.,
United States Attorney

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